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Supreme Court of the United States

October Term, 1975
No. 75-971

CHARLES SIMPSON,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Ohio Court of Appeals for the Eighth Appellate Judicial District of the State of Ohio

JAMES R. WILLIS, ESQ.
1212 Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114
216/523-1100
Attorney for Petitioner

JOHN T. CORRIGAN
Cuyahoga County Prosecutor
Criminal Courts Building
1560 East 21st Street
Cleveland, Ohio 44114
216/771-0660
Attorney for Respondent

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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PETITION FOR WRIT OF CERTIORARI
To the Ohio Court of Appeals for the Eighth Appellate Judicial District of the State of Ohio

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Charles Simpson, prays that a writ of certiorari issue to review the judgment of the Ohio Court of Appeals for Cuyahoga County, which judgment became final on October 16, 1975, when the Supreme Court of Ohio denied further appellate review.

OPINIONS BELOW

The judgment entries of the Supreme Court of Ohio denying further appellate review are attached hereto as Appendixes "A" and "B", *infra*, at pp. A1 and A2. The decision of the Ohio Court of Appeals for Cuyahoga

County, the judgment to which this petition is directed, was not formally reported. The Journal Entry of that Court is attached hereto as Appendix "C" *infra*, at page A3. The entry of the Court of Common Pleas (the trial court) is Appendix "E", *infra*, at page A20.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on October 16, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), on the basis that rights, privileges, and immunities under the United States Constitution are contended to have been violated.

QUESTIONS INVOLVED

(1) Can an affidavit for a search warrant which makes no effort to show the source of an undisclosed informant's conclusions, or to demonstrate that he is credible or his information otherwise reliable, support the issuance of a search warrant for the seizure of a motor vehicle as stolen property?

(2) Can an intentional or recklessly untruthful misrepresentation of a material fact, or even an unintentional misrepresentation of such a fact in an affidavit be disregarded if the affidavit is otherwise sufficient?

(3) Is it a violation of the right of confrontation and the hearsay rule where a crucial witness is allowed to relate as substantive evidence the contents of conversations had with an undisclosed informant, and with others—including a Judge and the County Prosecutor?

(4) Can a trial court, consistent with the requirements of due process, sanction the nondisclosure of the

identity of an alleged informant where it appears necessary (1) to avoid the risk of false testimony, (2) to secure useful testimony, or (3) it is essential to a fair determination of a cause or issue?

(5) Is it a violation of due process to charge a jury by means of disjunctive language which creates alternative theories upon which a verdict of guilty could be based?

(6) Is a law which alters the rules of evidence so as to permit an accused to be convicted upon less or different evidence than was required when the charged crime supposedly was committed invalid as *ex post facto*?

(7) Is it a violation of due process to instruct the jury that one can be convicted of committing one offense upon proof he committed another distinctly different offense?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Article I, Section 10, Clause 1:

"No State shall * * * pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

Constitution of the United States, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution of the United States, Amendment V:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Constitution of the United States, Amendment XIV:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Rule 29, Ohio Rules of Criminal Procedure:

"The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case."

Rule 41, Ohio Rules of Criminal Procedure:

"A search warrant authorized by this rule may be issued by a judge of a court of record to search and seize property located within the court's territorial jurisdiction, upon the request of a prosecuting attorney or a law enforcement officer.

A warrant may be issued under this rule to search for and seize any: (1) evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) weapons or other things by means of which a crime has been committed or reasonably appears about to be committed.

A warrant shall issue under this rule only on an affidavit or affidavits sworn to before a judge of a court of record and establishing the grounds for issuing the warrant. The affidavit shall name or describe the person to be searched or particularly describe the place to be searched, name or describe the property to be searched for and seized, state substantially the offense in relation thereto, and state the factual basis for the affiant's belief that such property is there located. If the judge is satisfied that probable cause for the search exists, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished. Before ruling on a request for a warrant, the judge may require the affiant to appear personally, and may examine under oath the affiant and any witnesses he may produce. Such testimony shall be admissible at a hearing on a motion to suppress if taken down by a

court reporter or recording equipment, transcribed and made part of the affidavit. The warrant shall be directed to a law enforcement officer. It shall command the officer to search, within three days, the person or place named for the property specified . . . ."

* * * * *

Ohio Revised Code, Section 2945.83:

"No motion for a new trial shall be granted or verdict set aside, nor shall any judgment of conviction be reversed in any court because of:

(A) An inaccuracy or imperfection in the indictment, information, or warrant, provided that the charge is sufficient to fairly and reasonably inform the accused of the nature and cause of the accusation against him;

(B) A variance between the allegations and the proof thereof unless the accused is misled or prejudiced thereby;

(C) The admission or rejection of any evidence offered against or for the accused unless it affirmatively appears on the record that the accused was or may have been prejudiced thereby;

(D) A misdirection of the jury unless the accused was or may have been prejudiced thereby;

(E) Any other cause unless it appears affirmatively from the record that the accused was prejudiced thereby or was prevented from having a fair trial."

Ohio Revised Code, Section 4549.04 [Repealed 3/20/72]

"No person shall commit any of the following acts:

(A) Steal any motor vehicle;

(B) Purposely take, drive, or operate any motor vehicle without the consent of its owner;

(C) Buy or conceal any motor vehicle that has been stolen, knowing it to have been stolen;

(D) Knowingly conceal a person who has stolen any motor vehicle."

Ohio Revised Code, Section 4549.04 [Effective 3/20/72]

"(A) No person shall steal any motor vehicle.

(B) No person shall purposely take, operate, or keep any motor vehicle without the consent of its owner, and either remove it from this state, or keep possession of it for more than forty-eight hours.

(C) No person shall, with intent to defraud, hire a motor vehicle or operate or keep a motor vehicle which has been hired. It is prima-facie evidence of an intent to defraud if the offender does any of the following:

(1) Hires the motor vehicle by means of any false representation or by means of the unlawful use of a credit card;

(2) Hires the motor vehicle knowing he is without sufficient means to pay the hire;

(3) Absconds without paying the hire for the motor vehicle;

(4) Knowingly fails to pay the hire for the motor vehicle on its return, in the absence of a prior agreement for extended credit, without reasonable excuse for such failure;

(5) Knowingly fails to return the motor vehicle as required by the contract of hire, without reasonable excuse for such failure.

(D) No person shall purposely take, operate, or keep any motor vehicle without the consent of its owner.

(E) No person shall receive, buy, operate, conceal, or dispose of a motor vehicle that was obtained by means of an auto theft offense, knowing or having reasonable cause to believe it to have been so obtained."

Ohio Revised Code, Section 4549.07

"No person shall knowingly buy, sell, receive, dispose of, conceal, or have in his possession any motor vehicle, as defined in section 4501.01 of the Revised Code, from which the manufacturer's serial number or any other distinguishing number or identification mark has been removed, defaced, covered, or destroyed, for the purpose of concealing or destroying the identity of the said motor vehicle."

STATEMENT OF THE CASE[1]

Charles Simpson, the petitioner herein, variously referred to throughout this Petition as "Simpson", "the accused", or the "petitioner", was found "guilty as charged by the Judge" of two (2) counts involving the alleged concealment, operation and purchase of various "stolen" cars. He was also convicted on a charge that he altered the numbers on a motor vehicle. The appeal to the Court of Appeals for Cuyahoga County was from the judgment

1. Whenever reference is made in this Petition to the Transcript of Proceedings in the trial court it will be preceded by the prefix "R".

entered on these verdicts, as well as the trial court's failure to grant either a judgment of acquittal or a new trial. That Court affirmed the judgment of the trial court and also denied petitioner's Motion for Rehearing (See Appendix "D", *infra*, p. A19). The Supreme Court of Ohio denied further appellate review. By this Petition, it is contended that this cause involves serious and substantial constitutional questions.

Because of the involved nature of this case, and the vastness of this Record, this Petition will develop the facts in several divisions. These will include those labeled *Pre-trial Motions, The Trial, Motions Made During Trial,* and *The Instructions.*

A. Pre-trial Motions

I

The charges against Simpson and his wife were conveniently spread over two cases numbered 6859 and 6860. The Court consolidated these for trial (R 213) after granting a separate trial for Mrs. Simpson (R 215). The Court first considered the Motion to Suppress filed in these cases.

The contentions made therein were to the effect that the original warrant, for the Volkswagen (Appendix "F" *infra*, p. A22), was issued without probable cause, and that the subsequent information acquired incident to this illegal search was then used as the prime ingredient in the affidavit utilized as the basis for the subsequent warrant for the Cadillac (Appendix "G", *infra*, p. A25).

The evidence bearing on the essential issues included the testimony of *William McComb*, the affiant. Distilled, his evidence was that he was connected with the Automobile Theft Unit of the Cleveland Police Department, and

that on *October 10, 1972,* he met with an informant, "who related that *he was aware of a theft ring which was operating in . . . Cleveland. . . .*" (R 12 [Emphasis added].) Supposedly this informant told him the names of the people involved and that they, "were proficient in the altering of vehicle identification numbers" (R 12).

Of specific importance here, as will be developed later, McComb stated:

> "He [the informer] told us that Mr. Simpson was in possession of a 1972 Cadillac Eldorado, that was a stolen vehicle.
>
> He told us that the vehicle had been titled to Mr. Simpson by way of a salvage title obtained from a place called Moyer's Auto Wrecking in Crestline, Ohio. He told us that the title that was for this car was for a '71 model, although the car actually was a '72. And he told us that the people that had done the work on the car, the altering the numbers of that, had altered the appearance of the car to make it to appear to be a '71 in order to match the title.
>
> He further said that Mr. Simpson was not in possession of a Porsche automobile. He said that this Porsche automobile had been stolen from Euclid, Ohio; that when it was stolen it was a Porsche model 911-T, like in Tom, and he said the title of this car had been obtained from Moyer's Auto Wrecking for a model 911-E.
>
> He said the identifying marks on this car had been altered to make it appear to be a 911-E to correspond with the title." (R 12-13).

McComb added further that this informant also told him during this October 10, 1972, conversation that:

> ". . . Mr. Simpson was in possession of a Volkswagen automobile which was stolen. He described it as a yellow Volkswagen with black interior. He told us that this car had been stolen on Euclid Avenue in Cleveland, Ohio, and again that the title for this car that was in Mr. Simpson's name or possession, it was actually titled to Nancy Simpson, had been obtained from Moyer's Auto Wrecking in Crestline. . . . [and that] the informer related that Mr. Simpson had been in possession of a number of other cars, in particular he mentioned a '69 Corvette, which he believed that Mr. Simpson had resold. He related that Mr. Simpson at one time owned a Camaro automobile which was a stolen automobile. He [also] related that Mr. Simpson's mother was in possession of a Chevrolet stationwagon, but basically, that is the story that he reported to us." (R 14-15.)

Based on this information, and obvious misinformation, McComb says he made various checks with certain insurance companies, title clerks, and individuals. He also checked with a Charles Allspaugh, Agent in Charge of the National Auto Theft Bureau in Chicago, Illinois (R 18).

Armed with these "facts" (if that is what they were), he consulted with our County Prosecutor and then with Judge Matia (R 54). According to McComb, they gave a lot of information to the Judge. At least, we have his testimony this occurred. And, we also have his unverified statement that he was sworn in before talking to Judge Matia. Be all that as it may, and we do seriously doubt this in fact occurred, the facts show that no court

reporter was present to record this asserted event, nor was there any other type of recording device on hand to verify this occurred as is *required* by Rule 41(C), *Ohio Rules of Criminal Procedure* (R 55-56).

Based on this specific disclosure, counsel moved the Court to "exclude all of the testimony from its consideration insofar as ruling on the motion . . . [which related] to conversations that he [McComb] had with Judge Matia, in which he . . . [alleged] a considerable amount of information, which obviously . . . [was] not on the affidavits" (R 58).

Although the Court reserved its ruling on this Motion, it is significant that the Court later decided that Rule 41, *Ohio Rules of Criminal Procedure,* "does not apply to . . . search warrants . . . obtained in October, 1972," and consequently, "the motion to exclude the testimony relative to the conversations with the magistrate is overruled" (R 206-207). The unavoidable effect of this is that the Court thus made it clear it was giving considerable weight to these asserted conversations. This, of course, made the credibility of the affiant a factor of increased proportions. Here, the critical ruling of the trial judge was that:

> "The facts in this case *as adduced from the witness stand* was that the detective, McComb, had discussions with the County Prosecutor and the original affidavit and search warrant was drafted and that they both proceeded to see Judge Matia, who was the issuing magistrate.
>
> *The Judge placed the detective under oath. There was searching inquiry* as to the matter and the Judge found, as a matter of fact, probable cause existed.

> *The second search warrant was obtained* later that day and *the same basic information was recited to them,* that is the whole story, and that had been made available to Judge Matia, *in addition to the affidavit* and the search warrant for the Cadillac was before him. He now had the additional information that the informant was reliable and on both occasions the Judge found that probable cause existed." (R 208-209.)

Significant here, the cross examination of the affiant shows the flat admission that his "affidavit does not set forth any of the underlying circumstances from which . . . [his] informant concluded that the Cadillac was stolen" (R 60).

Additional testimony on this reliability feature shows some almost incredible responses. Here, reference is being made to the affiant's testimonial analysis of various segments of his affidavit:

> Q. The affiant says this informant proved reliable by a subsequent check of records of the Clerk's office, which records revealed that one Nancy L. Simpson, the wife of Charles A. Simpson existed as the owner of a two-door sedan, 1970 Volkswagen, purchased September 14th from Moyer's Used Cars. Right? A. Right.
>
> Q. Now, you knew that you had to not only set forth in your affidavit some of the underlying basis for the—you had to set forth some of the reasons which led the informant to conclude the car was stolen. You knew you also had to set forth in your affidavit some of the underlying reasons for which you concluded that the informant was reliable, you knew that, didn't you? A. Right.

Q. So that the only thing that is set forth in your affidavit to bolster the reliability of this information, is your statement that he proved to be reliable because you checked the records and found out that there was a Volkswagen purchased from Moyer's by Nancy Simpson on September the 14th, isn't that right? A. That is not right.

Q. Well— A. You left out about a half of the page of the affidavit, by saying that.

Q. What did I leave out? A. Well, the affidavit goes on to say that further investigation was conducted and that it reveals a number of other things. It says, 'All this investigation dove-tailed with what the informant said.'[2]

Q. That is not what you said in your affidavit? A. If yours is the same as mine, it is.

Q. That appears to be the same, doesn't it? A. Yes.

Q. It says, right here, 'The affiant says that this informant proved reliable by a subsequent check of the records of the Clerk's office, which revealed that Nancy Simpson has a Volkswagen that was purchased on September the 14th from Moyer's.' That is what you say, isn't that right? A. Yes.

Q. That is what I thought you said. Now, *you also told us that this informant had told you that Simpson purchased the Cadillac from Moyer's?* A. *That's right.*

Q. *But you checked on that and found out that that was not true, is that right?* A. *Yes, I did.*

Q. *But you didn't put that in the affidavit?* A. We put in the affidavit what we did find out.

---

2. This reference in the affidavit, of course, to even a passing student of this facet of the law, simply has to be regarded as the affiant's conclusion and as such entitled to no weight.

Q. But in the affidavit that relates to the Cadillac seizure, you put in this affidavit, didn't you, that the informant had told you that Simpson had purchased a car on February the 10th from Pearson Motor Sales, didn't you? A. That the informant said that, no, that is not what it says. It says that the information from the informant, that the '71 Eldorado, black Cadillac was driven and titled to Charles Simpson, a stolen automobile, is what it says.

Q. But *why didn't you put in there the informant had told you that the 1971 Eldorado Cadillac convertible had been purchased from Moyer's and you had checked that and it didn't come from Moyer's,* why didn't you put that in there? A. What purpose would that have served?

Q. It would have shown that the informant wasn't reliable. A. I don't believe so

Q. All right. If the informant tells you that the car came from one city and gives you the name of a dealer there and you find out it came from a different city and county and from a different dealer, are you telling the Court that proves that informant is reliable? A. Informant—

Q. *Does that prove he is reliable, Mr. McComb?* A. *It doesn't prove that he is reliable.*

Q. *It tends to prove that he is not reliable, doesn't it?* A. *It might be construed that way.*

Q. *But you were not interested in showing that he was not reliable, you were interested in showing that he was reliable so it was for that reason that you didn't put it in the affidavit?* A. *Quite naturally.*

Q. Right. You were interested in deceiving the Court. A. Not at all. That is why we outlined other information in the affidavit.

Q. But you concealed proof that the informant was unreliable, didn't you? A. No, I did not.

Q. The informant also told you that Mr. Simpson's mother was driving a stolen car? You documented that for us in your testimony, didn't you? A. No. I don't believe that I said that at all.

Q. Are you positive of that? A. My understanding from—

Q. Not your understanding. I am talking about what you testified to. A. What I testified to, the informant said that his mother was driving a Chevrolet stationwagon—

Q. That was stolen? A. I don't think I said it was stolen. I certainly didn't intend to, if I did.

Q. What did you say? A. Let's ask the court reporter.

Q. I'm asking you. A. *I outlined what the informant said and one of the things he said, Mr. Simpson's mother has a Chevy stationwagon.*

Q. Does that prove him to be reliable if his mother has a Chevrolet stationwagon? A. Yes.

Q. If the person gives you something that is common knowledge that is proof that he is reliable? A. Common knowledge to who?

Q. Let me ask you this: Isn't it a fact, Mr. McComb,—do you deny—you are under oath—that Tyrone Battle told you in October, 1972, that Simpson was driving a stolen car, Cadillac, that his wife was driving a stolen Volkswagen, that his mother was driving a stolen—what kind of a car was that? Chevrolet.

MR. LIPOLD: Just driving a stationwagon.

Q. Driving a stolen Chevrolet stationwagon that was titled to her—

MR. LIPOLD: Objection.

Q. Do you deny that Battle was not the one that told you this? A. Yes, I deny that.

Q. Affirmatively? (R 61-66 [Emphasis added].)

The latter portion of the above quoted testimony is significant because while the affiant denied his previous testimony had been that the informant told him Simpson's mother was driving a stolen Chevy stationwagon, the *facts* show this specific remark was in the written statement the affiant indicated was a summary of the information given him (R 114).

Also relevant at this juncture is testimony by this witness that Tyrone Battle, the person who testified during the trial that he stole the Cadillac in question, *was not* his informant (in fact he affirmatively denied that Battle was his informant [R 66]), he could only testify in response to the question how did the informant know the Cadillac was stolen by stating, "I cannot disclose the informant's name or how we obtained this knowledge without disclosing his name, because the informant fears for his safety" (R 68).

Then, too, the affidavit stated the Cadillac had been purchased from a Pearson Motor Sales and that it had originally been "a metallic bronze color" (R 68). Further, that the car Simpson was driving appeared to be an original black paint job (R 68). However, the affiant admitted that they only talked to Pearson to determine the kind of car he had sold Simpson *after* the warrant had been issued (R 74), and that he did not determine, prior to the issuance of the warrant, from Pearson the condition the car was in when it was sold to Simpson (R 81). He did not know whether what had been sold was "a junk heap" or a "repaired car" (R 82).

With reference to the warrant for the seizure of the Volkswagen (as had been done with the Cadillac), this officer was asked to show where it appeared, in his affidavit, the source of the informant's knowledge that the car was stolen (R 98). Here, again, he admitted it *was not* set forth in the affidavit. Also, he did not check, according to this testimony, to see if the car Mr. Simpson was driving was a stolen car. He admitted that if Battle had told him her car was stolen and it in fact was not this would affect his credibility (R 113). But, of course, McComb had to make this admission, since he says it was afterwards determined her car had in fact been purchased legitimately (R 113).

This then brings us to perhaps the most crucial aspects of our contention with reference to (1) the affiant's credibility (essential aspects of which were *perjurious*); (2) the various invalid arguments made by the prosecutor; and (3) certain indefensible rulings made by the Court.

First, the Record shows McComb also credited his informant with having told him Simpson's wife was driving a car that had been stolen in Cleveland in the early part of 1971 (R 108), that he established Simpson's wife was driving a Volkswagen that had been purchased from Moyer's, and he learned from Shirley Patton the condition of the car when she told it to Moyer's. Further, that the National Bureau told him the only Volkswagen stolen in Cleveland that had not been recovered was yellow with a black interior and this made his informer reliable (R 108-109).

With reference to the Cadillac (for which the warrant was issued), the informant told McComb that Simpson was driving a stolen Cadillac (the source of the informant's conclusion was unstated), which had been purchased from

Moyer's. He then traced this car back to its origination and learned it was originally sold as "bronze" and the one Simpson had was black, which he concluded was an original paint job (R 110).

Also of significance here is the fact that the affiant did not relate either in his affidavit or in his invisible testimony to Judge Matia that the informant was wrong in his statement that the car had been purchased from Moyer's (R 110). And he did not further check, at least this is what he said, to learn Simpson's mother's car had been purchased from Luby Chevrolet (R 113).

Any question as to whether these omissions were willful, as we contend, is resolved by the segment of the Record quoted above (—that is, R 61-66).

With the above salient facets of McComb's testimony in mind, he was then asked to identify a written document (Motion Exhibits C-1 and C-2). His testimony was that it was "a typewritten summary of the information that was given to . . . [him] prior to the time . . . [they] obtained the search warrants" (R 114). *He denied it was given to him by Battle* (*ibid.*). In any event, this "written summary" stated:

> "*Battle said* that he was familiar with an auto theft ring that was operating in Cleveland, Ohio, and furnished the following information in this regard: The operation of one Sam, a male Negro, age 26, who has a garage in the immediate vicinity of 110th Street and Superior in Cleveland, in which Sam alters the confidential numbers on stolen vehicles.
>
> Another individual in Cleveland who has also purchased a wrecking yard in the same area where Sam works on his cars, is one Kaiser Houston. Kaiser

usually works on trucks and Porsches, alters the numbers, and sells them." . . .

* * * * *

"Both Sam and Kaiser have worked out methods for obtaining papers for the vehicles, which they resell or upon which they change the numbers. Kaiser gets the majority of his cars from Pennsylvania. Sam gets most of his cars from Detroit. Sam has previously or maybe currently been employed by Fisher Body plant, located on Coit Road, Cleveland. Sam is an excellent mechanic in changing and altering numbers on vehicles, as the police department has examined a number of vehicles after Sam has worked on them, and have been unable to identify them as stolen cars. The numbering stamps that Sam uses to put a serial number on a vehicle are not the same types of numbers that are put on at the factory, but it would take an expert from the factory to determine the differences.

As an example *some of the vehicles that Sam has worked on have been purchased by the City prosecutor, Charles Simpson, he is believed to have the following stolen vehicles in his possession*, upon which the numbers have been altered:

The 1972 black Cadillac, titled in 1971. Originally, this vehicle came from Detroit, but was stolen from the Somerset Inn, located on Shaker Boulevard. The car was a rental car from Detroit. The words Eldorado, which are on the front of the 1972 Cadillacs was removed and the holes were filled in and then spot painted. Kaiser had the vehicle first, having obtained it from 'Shorty' [Moyer's] or 'Crestline'.

A 1971 or 1972 Porsche which Simpson keeps at his house was repainted a burnt orange color. This vehicle is titled possibly as a 1971. Sam did the work on it and turned it into a Model 911-E, however, when it was stolen, it was a 911-T. It was stolen from some apartments on Euclid Boulevard in the suburbs.

A 1970 Volkswagen sedan[3] which Simpson's wife drives, which usually sits outside of Simpson's house. It was stolen by one Campbell, who gave it to Kaiser, who sold it to Charlie Simpson. Simpson's mother drives a 1969 Chevrolet station wagon, *which is also stolen* [cf. R 65-66], and which was worked on by Sam. This vehicle is kept in some garages in the rear door to Simpson's home, which Simpson rents from his neighbors near 110th and Superior. It is actually between 107th and 110th and Superior. To enter the garage from the rear, one must take the alley off of 110th Street. He originally had a garage on 110th Street near Superior which had a sign on the garage, which was possibly Color Specialities.

Simpson also has a *1970 or 1971 Corvette*, which vehicle was stolen in Cleveland after it had been brought there by some people from Canada. There are no papers on the vehicle, as it is used to race at Thompson Raceway, Thompson, Ohio, and the 1972 Dragway, Norwalk, Ohio.

Kaiser moves his stolen property fast. His lot is at 130th near Surplus City. It is the lot across the street from the Town Gas Service Station, just

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3. McComb says he told Judge Matia that his informant told him this car was stolen on Euclid Avenue (R 14). To the extent then this may have influenced the issuance of the warrant, it must be so credited.

over the bridge, going east. Kaiser has a flat bed truck which was originally a pick-up truck. He simply cut the pick-up bed off and put on a flat bed. One time Kaiser sold his brother a stolen car, and his brother was arrested for it. Kaiser had to return the money to his brother.

Sam, in working on the vehicles, has a heavy duty hoist where he lifts the bodies off the frames. Sam does the work on the cars by himself, and will not allow anyone in the garage when he is working on a car. Sam has the reputation of being very cautious, and has not been arrested in Cleveland. Sam refused to do any cars for several months after a car ring was broken up that operated at 111th and Superior. This place was where the police found about 500 license plates in barrels, which belonged to vehicles that had been worked on.

When Sam works on a car he changes the transmission numbers, the window numbers and the engine numbers along with the visible numbers.

Attorney Josselson is Charlie Simpson's attorney. Josselson has a 1971 or 1972 Grandville, white top, maroon body, which came from somewhere in Michigan, and is reportedly stolen.

Battle said that he was only allowed to be present near Sam's garage *on one occasion, when Sam was actually working on a vehicle, which he believed was a white Cadillac.*" (R 114-119 [Emphasis added]).

Thus, the affiant's positive admission that this document was a summary of the information supposedly given him *prior* to the issuance of the warrants (R 114), a position reaffirmed by him during his re-cross examination

(R 127-128), is most significant. Also significant is McComb's categorical testimony (although it was apparent Battle was being quoted as having made the statements therein) that he got the document from another informant who could have been a police officer (R 128). As to this, there is his further evidence that if his informant—that is, the one that gave him the document—was a police officer then *when he said that person was reliable he was talking about a fellow officer* (R 128).

Returning, then, to the stated basis for the Court's ruling denying our Motion to Suppress, by the Court's own reckoning, he regarded as a factor on the question of the informer's credibility and the reliability of his information, "*the officer's personal knowledge of the informer.*" (R 210 [Emphasis added].) Stated another way, he found that the policeman-informant who gave McComb the obviously secondhand information contained in the summary was reliable.

The Court also stated he regarded as significant the fact that the affiant worked for the Auto Theft Unit and was able to make an informed assessment. Further, that the *affiant's personal belief as to the truthfulness of the informant's information was relevant.* More simply put, McComb believed what a fellow police officer told him, because obviously this officer would not have told him (McComb) if he (the informant-officer) did not believe it to have been the truth.

Then the Court really taxes our credulity by adding that the informant's information was fresh and had been *personally corroborated* (*ibid.*). As to the *freshness* point, there is no way the Court could have possibly determined when *Battle*, or anyone else, made these statements to the informant. Hence, to conclude he had done so on

October 10, the day the affiant says he talked to his informant, is to say the record supports this conclusion because the Judge says so.

This same assailment applies to the Court's conclusion that the informant had been found reliable in his recent information, and to the inaccurate statement that the officer *personally corroborated* "the informant's information." (*ibid.*).

As to the corroboration point, the Record is clear. It is simply *not* a fact that the officer corroborated "the informant's information." This is so because some of the informant's so-called information was shown to be false. The officer even conceded (although we contend he *lied* as to Simpson's mother's car) he did not check certain crucial segments of the information supposedly given him. (As an aside one must wonder why the Court would generalize on a point as crucial as this. While we concede the officer's testimony could support a statement to the effect that he corroborated *some*, rather than *all*, of the information supposedly given him, the distinction between these two views is rather substantial.)

This leaves the "freshness of the [alleged] informant's information" a factor (*ibid.*). Here again, the fact that the Court was reasoning on an *ad hoc* basis becomes most clear. For surely it has to be the Court was trying to justify the conclusion he wanted to reach to even mention this point.

This idea is especially compelling when one realizes that even if the informant were a person other than Tyrone Battle, it was apparent the "informant" was reporting what Battle told him. Viewed in this sense, any determination as to the "freshness" of the information has to turn not on the date information was given to the affiant, but rather on the date the information was given to the informer.

The final point urged by the Court, in denying the motion, was the fact that the reputation of the suspect can be regarded as a factor (*ibid.*), which the Court coupled with the suggestion such evidence was in this record.

Since there was no evidence bearing on the petitioner's reputation presented either to the Court, to the issuing magistrate, or stated in affidavits, one can only hope the Court did not expose a predilection on its part to ratify the actions of this officer regardless of how gross.

Other evidence considered by the Court on the motion included that rendered by Detective *Thomas Gaul*. His testimony was that he had seen Simpson, who was an Assistant Police Prosecutor, driving the Cadillac and had seen it several times parked around the police station (R 132). He saw nothing unusual about the paint job done on the car. In short, it was his opinion the car had not been repainted, although on cross examination he admitted he was not an expert (R 136).

II

It was then, and is now our contention that the original Motion to Suppress should have been granted on the basis of the factual patterns in the Record at the close of the evidence heard directly on the motion. However, even assuming *arguendo* the Court's original rulings were correct, given certain crucial testimony at the trial, the Court's failure to grant this motion when it was renewed both at the close of the State's case (R 2261), and at the close of all the evidence (R 2656) is a further significant factor in this appeal.

The additional relevant evidence to which reference is being made involves the testimony by *Tyrone Battle* and

McComb. Here, the Record is most clear. Battle denied that he "ever furnished *any* information . . . before November of 1972, to the effect that . . . [he was] familiar with a vehicle theft ring operating in Cleveland" (R 1187). It is, of course, a fact of no mean significance that Battle was in California from March or April 1st of 1972, until November, 1972 (R 752-753). The information supposedly given by the informant was on *October 10, 1972* (R 12). In line with this, the Record shows further Battle's specific denial that he discussed any of the cars particularized in the summary of the information supposedly supplied by the informant. These were, "a Corvette, a Volkswagen, and a Cadillac." Nor did he discuss "a Porsche, or a station wagon, Chevy station wagon" (R 1244).

More specifically, Battle's unequivocal testimony was as follows:

> Q. They didn't discuss none of those cars with you? A. No.
>
> Q. You never discussed any of those cars with anybody. A. Not in California.
>
> Q. *Meaning you did not discuss them with anybody before October 27, 1972, right*? A. No. *Before January 6.*
>
> Q. *'73*? A. *Right.*
>
> Q. That follows then, you hadn't discussed it then before October 27th, 1972? A. I hadn't.
>
> Q. Had not, right? A. Yes (R 1244-1245).

Still another aspect of this problem involves the Court's refusal to permit the defense to question Battle relative to the contents of the purported summary which specifically attributed to Battle certain specific information, and inferentially exposed him to be the source of all the so-called information in the summary.

As to this, it was the Court's ill-advised position that because Battle denied having seen the statement, and the State took the position they did not know who had given the summary to Detective McComb, this made their objection valid (R 1189-1190). On the other hand, the defense took the valid position that the defense had an absolute right to show that the State's chief witness made statements out of court that were inconsistent with his in court testimony (R 1190-1194).

In any event, even though the Court made the wrong ruling, certainly one that cannot be defended in either law, logic or common sense, one fact did emerge from his remarks. The Court recognized the "summary" as a "purported synopsis of what Mr. Battle supposedly had said" (R 1193).

Given this expressed conviction by the Court, the prosecutor's analysis of this point will at least be interesting, as he will be required to argue those flaws in Simpson's conviction are harmless errors—a position that is thoroughly at odds with the adamancy of his objections at the trial.

Again, during the trial on the merits, McComb (the affiant) repeated that Defense Exhibits R-1 and R-2 were a summary, or (using the Court's term [R 1193]) a "synopsis" of the information supposedly given him by his informant on October 10, 1972 (R 2048).

Of course, the Record here shows that the Court affirmatively refused to require the disclosure of the identity of the person who supposedly gave this document to McComb (R 2049-2050). While the Court's refusal to require disclosure on the suppression question was wrong, the fact that the Court had previously allowed this witness to testify, over defense objections, as to his asserted conversa-

tion with this undisclosed informant (R 1916-1921), compounded the error by also affronting the confrontation clause, and as such cannot be as easily glossed over as the Court and the prosecutor were willing to do. This course of conduct was strenuously opposed by the defense in quest of disclosure (R 2051-2059).

More specifically, it was argued to the Court, at this juncture:

> "We have the point being emphasized by Mr. McComb today that this statement was a summary of the information that was given to him on October tenth. Now, all of this, Your Honor, I want the Court to understand, bears on the propriety of the issuance of the search warrant. It bears on the propriety of the Court's order sustaining the issuance of the search warrant and the seizure of the Cadillac and Volkswagen." (R 2057-2058).

Here, again, in denying the request for disclosure the Record simply shows the Court's penchant for assuming the prosecutor was the appropriate lawgiver on the serious questions involved in this case. For, it was at this point the Court allowed the Record to perpetuate these remarks:

> "I would say [the defense request for disclosure was being denied] . . . because of the argument of Mr. Lipold" (R 2017).

B. The Trial

The facts in this case show the Volkswagen, charged in Count 1 as having been illegally concealed, operated, purchased or received by Simpson and his wife, had been purchased by Mrs. Simpson from Kaiser Houston. Mrs.

Simpson had talked to a neighbor, Donald Rutger, and in the course of that conversation she mentioned wanting to buy a Volkswagen. Donald told her he had a friend who could sell her one—this turned out to be Kaiser Houston (R 2270-2271). She subsequently bought a Volkswagen from Houston on September 8, 1971, paying for it from money she had saved (she was a nurse) and partly from money she borrowed from her mother-in-law. She received a receipt (R 2272). It should be noted too that her husband, Charles Simpson, not only had not participated in this purchase, he had opposed the purchase because he thought Volkswagens were unsafe (R 2272-2273). The title shows the vehicle was transferred from Moyer's. As was shown in many instances by the State, the title often jumped from owner to salvage yard without intermediate ownership in the insurance company. Likewise, the evidence supports the jump from the salvage yard to Mrs. Simpson without title in Kaiser Houston who had a body shop and repaired salvaged automobiles.

The original owner had been Shirley (Patton) Hudson who bought the 1970 Volkswagen new. Subsequently the car was wrecked in an accident and sold to Moyer's. It had a white exterior with red interior. The car as purchased by Nancy Simpson had been repaired and repainted yellow (R 2285).

An Allan Clapp also owned a 1970 yellow Volkswagen (R 1385) which had been stolen August 10, 1971 (R 1389-1390).

Simpson's contact with this car was limited to his having operated it in the same fashion any husband would operate his wife's car—that is, occasionally.

The Cadillac, which was later titled to Simpson, had a rather involved history—regardless of whose version

one accepts. According to the State, the Cadillac had been stolen by Battle (R 746), from Mark Hartley, while he was a guest at the Somerset Inn. Their evidence was that it was delivered to Kaiser and then to Simpson. Somewhere along the line the numbers were changed—both by substitution of frame sections and by the substitution of the numbers belonging to the salvaged car purchased from Pearson Motor Sales. This latter car had been totalled in a wreck in Cincinnati, Ohio. At least, the owners regarded it as a total loss because it was a used past model (R 469).

Tyrone Battle testified that after stealing the car he sent it by his accomplice to Kaiser Houston (R 748-749). The next day they picked up the money for this transaction from Simpson (R 750).

In March or April, 1972, he left for California (R 772) where he stayed until November, 1972 (R 753). He was arrested in Cleveland in December, 1972 (R 754). Next, he admitted meeting McComb for the very first time in December, 1972 (R 754).

On cross examination Battle implied he was rather proud of the fact (R 776) that he was a notorious car thief. His total exceeded a mere 300 or 400 cars (R 759). Although he sold all these cars he could not tell us the names of any of the people to whom they were sold (R. 759).

In any event, as the Court saw it, he was not required to reveal any of their names and addresses (R 760-761). Also, and this is important, by his own admission, Battle was a liar (R 766), and he had a history of having lied to the police (R 766). As he put it, he will lie when he is "hemmed up" (R 766), and that "it's not a planned thing. It is just something that happens right then" (R 767).

Also, Battle admitted he "will deceive the authorities in order to avoid prosecution" (R 768). And he conceded that although he had stolen possibly 800 or 900 cars he had only been caught for stealing 3 cars. It was for these thefts that he was sentenced to the workhouse (R 771-774)

Battle denied that what in fact had happened was that his brother-in-law stole the Cadillac from the Somerset Inn, sold it to Kaiser Houston, and that he learned about it and simply claimed credit and implicated Simpson in order to improve his own predicament (R 788-789). At least this much is certain, while Battle misdescribed the car as being triple black—that is, black top, black body and black upholstery (R 782-783), the car stolen from Hartley had red upholstery (R 559).

Simpson's version was that he purchased the car through Kaiser Houston from Pearson Auto Sales. Pearson, in turn, had purchased it from the salvage dealer who obtained it following the Cincinnati wreck. He regarded the car as repairable (R 527-528). Pearson also testified he sold the car to several men from Cleveland for $5,500, which included sufficient parts to rebuild the car in its entirety (R 534).

Simpson's evidence further showed a relationship between the sale of his 1969 Cadillac to Kaiser and the transfer of the 1971 Cadillac Eldorado to him (R 2417-2421).

The third count of the indictment involves the alleged altering of identification numbers on a Camaro. The history of this car is as follows: A Leonard Hotaling bought a 1969 Camaro (yellow exterior) which he wrecked in an automobile collision. The car was then sold to a salvage dealer—R & R Auto Sales. This car was subsequently sold to the petitioner, Charles Simpson. He had the car

repaired but chose to resell it when his wife became pregnant and they needed a larger car. He sold it to a Mary Ferguson. The car at this time was black with silver stripes as it had been totally rebuilt and repainted. The State alleged that this was a stolen vehicle.

C. Motions Made During Trial

In addition to the "Motion for a Mistrial" (based *inter alia* on the abuse to Simpson's right of confrontation), the "Motion to Suppress", which was renewed at various points throughout the case (R 2261, 2657), the "Motion for Discharge", and for the "Disclosure of the Identity of the Alleged Informant"; the defense moved (first at the close of the State's case [R 2261], and renewed at the close of all the evidence [R 2656], and again post-verdict) for a Judgment of Acquittal.

Still another motion sought to require the elimination of the disjunctive features of the indictment, and for the elimination of those alternatively charged crimes for which there was insufficient evidence to support a conviction (R 2656).

Additionally, there were the defense motions and objections related to the admission of so-called "similar acts" testimony. The facts relevant to these motions will, at least to some extent, be developed during the course of the argument related thereto.

The denial of all these motions (R 2672), was likewise assigned as errors.

D. The Instructions

Prior to the submission of this case to the jury the defense submitted various written instructions, which were coupled with the request that they be given to the jury

before argument. Those rejected by the Court included the last sentence of No. 3, a segment of No. 4, No. 5, and No. 7 (R 2686-2687).

In addition to the above formal request, the defense made the further specific request with reference to the various charges in this case "that an included offense on each of those charges is that described in Section 4545.07, motor vehicle with concealed identity" (R 2688). It was argued at the time that:

> "4549.07 is an included offense in the charges brought under 4549.04; particularly 4549.04(E) . . . insofar as the concealed aspect is concerned. . . . [Here] the statute uses the same language, 'buy, sell, receive, dispose of, or conceal, or have in his possession a motor vehicle.' I think the clear intent of the legislature was to make that particular charge under .07 an included offense under 4549.04(E). I would [therefore] request the jury be instructed that such is the case" (R 2688-2689).

The Court refused to give this instruction with reference to Count 3.

Additionally, the defense requested the Court to specifically limit the scope of the phrase "on or about" as recited in the indictment (R 2693). Here, it was contended that "on or about" should be defined as being reasonably close to the date indicated (*ibid.*).

Subsequent to the charge the objection was made to charging the jury *disjunctively* for the reasons that such language does not emphasize that all must agree as to a specific alternative (R 2753). Also, an objection was made to the Court's use of the word "disguise" as an aspect of conceal. Also, the defense objected to the following segment of the Court's charge:

"Where a motor vehicle is sold by one not an automobile dealer to another, title to such motor vehicle can pass without the formal issuance of a new certificate of title, by means of the duly executed assignment of title, and, as between such persons, notwithstanding the failure to secure a new certificate of title, the ownership of such vehicle passes to the vendee" (R 2715).

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

I. An Affidavit for a Search Warrant Which Makes No Effort to Show the Source of an Undisclosed Informant's Conclusions, or to Demonstrate That He Is Credible or His Information Otherwise Reliable, Cannot Support the Issuance of a Search Warrant for the Seizure of a Motor Vehicle As Stolen Property.

(A)

In this case, the affidavit for the search warrant for the Volkswagen, the first warrant issued, contains the conclusory assertion that (1) the affiant had "received information from an informant to the effect that a Volkswagen automobile, 1970, was stolen in Cleveland, Ohio, in the early part of August, 1971, that in the month of September, 1971, a Charles Simpson purchased a wrecked 1970 Volkswagen from Moyer's Used Car and that he, Simpson, is using the title relating to the wrecked Volkswagen for the . . . stolen Volkswagen."

Next, (2) the affiant concluded, for the Court, that "this informant proved reliable by a subsequent check of

the Clerk's office which records reveal that one Nancy Simpson, the wife of Charles A. Simpson, is listed as the owner of a . . . 1970 Volkswagen purchased September 14, 1971, from Moyer's Used Cars."

Further, (3) the affiant *concluded* the Volkswagen purchased from Moyer's "was a total wreck to such a degree that it was virtually impossible to repair," and that his investigation revealed a yellow Volkswagen had been stolen on August 10, 1971, from one Allan Clapp. It was then concluded, for the Court, that "the affiant has reason to believe . . . the Volkswagen . . . titled in the name of Nancy Simpson and driven by Charles Simpson . . . [was the stolen] automobile of Allan Clapp."

For starters, it must be obvious from a mere cursory reading of the affidavit that the affiant in no way even sought to satisfy the *basis of knowledge* prong of the test established (in *Aguilar v. Texas*,[4] 378 U.S. 108 [1964]) for measuring hearsay information in a probable cause setting. This pr[illegible] required the affiant to set forth "some of the underlying circumstances" which led his informant to conclude in substance that, "Charles Simpson had purchased a wrecked 1970 Volkswagen from Moyer's and that he, Simpson, . . . was using the title to the wrecked Volkswagen for . . . [a] stolen Volkswagen"—that had been stolen *during* August in Cleveland.

But the really short answer was supplied by the affiant in his testimony. He admitted there is nothing in the

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4. The two-prong test of *Aguilar* requires that the issuing magistrate be informed of (1) some of the underlying facts and circumstances from which the informant drew his conclusion, *and* (2) some of the underlying circumstances from which the affiant-officer concluded the information was credible or his information reliable. (378 U.S., at 114). Under *Spinelli, infra*, the first prong of *Aguilar* may be satisfied by informant's description of accused criminal behavior in sufficient detail (393 U.S. 410, 416-418).

affidavit showing the source of this informant's knowledge (R 60, 99).

Given this crucial admission, the next inquiry must be was the information reliable. In deciding this question, it becomes important to know if the informant himself was offering direct knowledge as distinguished from hearsay twice compounded. If the latter is true, then the entire evaluation process must begin again at a second level of remoteness. The question then is did the primary informant pass along sufficiently detailed information to enable the Judge issuing the warrant to determine (1) the credibility of the secondary informant, and (2) the worth of his information. Not only this, if it should happen that the secondary informant is a mere conduit for hearsay thrice removed from a tertiary informant, the evaluation process is escalated to yet another level of remoteness. See *Spinelli v. United States,* 393 U.S. 410, at 410 (majority opinion), and 423-425 (concurring opinion).

What this means is that ultimately the Court issuing the warrant must have the benefit of someone's firsthand knowledge in order to evaluate the worth of the information. *And,* he must have satisfactory proof of the credibility of every person involved in the chain of transmission from the initial informant to the magistrate himself. As applied to this case, then, there is just no way the unnamed informant can pass the second prong—that is, the veracity prong—of the *Aguilar-Spinelli* formulation. This being the case, our conclusion, since the credibility of the affiant's so-called informant was indispensable to the validation of the affidavit in this case is that the affidavit was insufficient.

On the other hand, we concede it *may* be possible to satisfy this disjunctive aspect of the veracity prong of

Aguilar without knowing anything about the credibility of the affiant's source—that is, his informant—the question then is was the so-called information furnished under circumstances giving reasonable assurance of trustworthiness.

In our judgment, even with this possibility, there seems no way such a thesis could rescue this warrant. This is so for a number of reasons. The first of these is, of course, the patent fact that the "summary" of the informant's information (R 114-119), or the "synopsis" of what Battle said (R. 1193), shows the informant in this case was a mere conduit, if he was that, for some more remote source.

But even that is not all. The "synopsis" credits Battle with having said things that were both at variance with items particularized in the affidavit, and with the other indisputable facts. Then there is the irrepressible fact that Battle denied having made the statements in the synopsis. Furthermore, the Record categorically shows Battle was in California; hence, could not possibly have been subjected to any interview in Cleveland on October 10, 1972—the day McComb says he talked to his informant (R 12). Then, of course, the fact that the affiant's informant stated Charles Simpson, as distinguished from his wife, had purchased a Volkswagen from Moyer's shows, if nothing else, the lack of any self-verifying details in the hearsay information relied on as the basis for the warrant.

Even if the above analysis were *invalid,* the allegations still could pass muster *only* if the affidavit furnished a sufficient basis for the conclusion that the source of the so-called information was "credible." But it does not do that either.

Here, of course, the affiant *did not* even suggest this was the case. His conclusion was that his informant was "reliable,"[5] because he checked the title records on the basis of the informant's statement that Charles Simpson had purchased a car from Moyer's and was (—that is, Charles Simpson) using this title for a stolen Volkswagen. Thus, one must wonder how the discovery that Simpson's wife was the purchaser of a Volkswagen from Moyer's proves the informant is reliable. This is especially so since the basis for the informant's conclusion that the car was stolen was not even suggested in the affidavit (R 99).

It is obvious this is the type of allegation the Court doubtless had in mind when it concluded that,

> "in the absence of a statement detailing the manner in which the information was gathered [here the assertions made by the informant about Simpson], it is especially important that the tip describe the accused's criminal activity in sufficient detail so that the magistrate may know that he is relying on something more substantial than a casual rumor [then] circulating" (*Spinelli*, at 416).

(B)

The analysis developed above, as well as the valid conclusions drawn therefrom, of course, apply full strength

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5. It could very well be that the affiant's use of the term "reliable" in the content of describing the alleged informant as a person shows a lack of appreciation by the writer of the affidavit of the distinction between "informational reliability" and an informant's "credibility." Under *Aguilar*, 378 U.S., at 114, the conclusion that an informant is credible is a relevant circumstance, if the basis for that belief is furnished the magistrate *and* the basis for the informant's conclusions are likewise exposed.

The reliability feature relates to simply an alternative way the requirements of *Aguilar* can be met, if the source of the informant's conclusion is stated in the affidavit.

to the search warrant issued for the Cadillac—only more so. As to this warrant, in addition to the failure to offer *any* basis for the informant's conclusion that "a 1971 Eldorado convertible black Cadillac, being driven by and titled in the name of Charles Simpson is a stolen automobile." (R 59-60); "reliability" (as distinguished from "credibility") for this unnamed source was specifically related to the fact that his conclusion that the Volkswagen was stolen proved to be true.

If the above analysis requires the conclusion that the original warrant (for the Volkswagen) was issued without probable cause, then there is no way to avoid characterizing this second warrant as having been based on a "fact" that was "fruit of the poisonous tree." Stated another way, we contend that inasmuch as the Volkswagen warrent was issued without probable cause, to the extent the Cadillac warrant was based on the fruit of this illegal search, the seizure of the Cadillac has to be viewed as illegal. *Silverthorne Lumber Company v. United States*, 251 U.S. 385, 392 (1920); *United States v. Paroutian*, 299 F.2d 486, 489 (1962); *State v. Thompson*, 1 Ohio App. 2d 533 (1965).

(C)

Also, the Record shows the Court's stated position to be that Rule 41, *Ohio Rules of Criminal Procedure*, was no bar to his consideration of the information the affiant supposedly gave to the issuing judge. Here, the Court specifically concluded that this Rule does not apply to warrants issued prior to the effective date of our new Criminal Rules—July 1, 1973.

We contend, on the other hand, that the existence of these rules at the time the motion was considered was the relevant circumstance. Furthermore, this specific rule ob-

viously reflected the growing awareness of the extent the public has been victimized by police perjury. See Grano, "*A Dilemma for Defense Counsel: Spinelli-Harris, Search Warrants and the Possibility of Police Perjury,*" 1971 U. ILL. L.R. 405, 427-457.

Under this Rule, of course, the requirement is that all of the elements necessary to establish probable cause must be expressly stated in the affidavit as the basis for the warrant. The upshot being that the judicial officer issuing the warrant may only do so on the basis of information stated in the affidavit when such is sufficient to support his independent determination that probable cause exists. *Whitely v. Warden,* 401 U.S. 560, at 564 (1971). From this position, emerges the concept that the mere assertions by an affiant that probable cause exists based on unsupported conclusions cannot justify the issuance of a warrant.

As applied to this case, a necessary inference from the Court's position that he could consider the conversations supposedly had by the affiant with the issuing Court, is that he did so.

Given then the *Spinelli* requirement that courts should demand a higher standard of specificity of information when scrutinizing an affidavit which relies on an informer's tip (393 U.S., at 415), the fact that this affiant was impeached to the extent that he was; as well as the exposure that the affiant had obviously not indicated to the magistrate that his primary source was also relying on hearsay certainly cast a dark cloud on the Court's ruling in this regard.

In this sense, if the Court, in spite of Rule 41, had the discretion to consider the asserted contents of these conversations with the issuing court, such was surely abused. This is especially so in light of the State's successful op-

position to any disclosures that might have led to the informant's identity.

In fully evaluating these contentions, it is hoped this Court will recognize that one of the real problems elsewhere (—that is, in places other than Ohio, where police officers are almost automatically regarded by the courts as honest, credible and reliable except when they are defendants or defense witnesses) involves the genuine concern being evidenced in the reported cases over the apparent willingness of some magistrates to simply rubber stamp applications for warrants. This most courts do despite the virtual plethora of cases holding that courts cannot, with impunity, continue to rely solely on an affiant's assertions that his informant is trustworthy, truthful, prudent, reliable and credible. Thus, the law has imposed an affirmative duty upon the courts, qualified to issue warrants, to see to it that they are not being deceived. See *United States v. Dunning,* 425 F.2d 836, at 840 (1969). Also see Rule 41(C), *Ohio Rules of Criminal Procedure,* which expressly authorizes the production of witnesses before the magistrate to assist him in the performance of his duty to independently determine whether the privacy of our citizens should be invaded.

If this concept has any validity whatsoever, then our case presents a virtual textbook example of when a warrant should *not* have been issued. It also shows all of the reasons why, if the Court felt obligated as this one obviously did, to issue the warrant, he should have required the affiant to produce the informant at least so that the court could satisfy itself that one existed. This surely could have resolved some of these veracity questions. Unfortunately, none of these things were done, and we have a situation here where the trial court, in reviewing the issuance of a warrant, not only considered as relevant the

substance of information supposedly given outside the four corners of the affidavit, but frustrated the defense efforts to prove the issuing court had been willfully deceived.

The Court of Appeals, in dealing with the contentions made above, drew the conclusion that "probable cause was established from information supplied by the affiant from his own knowledge irrespective of any additional allegation in the search warrant attributed to an undisclosed informant" (see *Journal Entry,* Appendix, p. A8).

As to this crucial holding, certain issues are at once apparent. Unless the Court of Appeals' opinion is being either misread or misunderstood, while inferentially agreeing with counsel that the trial judge's stated reasons for validating these warrants were defective, the Court has convinced itself that the affidavits were sufficient on their face. This the Court concludes to be the case in a fashion that leaves the trial judge, the trial prosecutor, and the affiant unconvinced that the Court would zealously scrutinize shotgun assertions in an affidavit, if it just happens to also contain a sufficient number of factual points. Not only this, if the affidavit is subsequently validated the real culprits can be secure in the thought that they will not even be cautioned that there is a point beyond which they can *at least* be rebuked for either lying under oath, or being less than candid in their dealings with our courts.

As to this specific finding by the Court—that is, that the affidavit was facially sufficient, it can only be that the Court of Appeals has concluded that it can "fairly be said that the tip [—that is, that Simpson was in possession of these stolen cars, even after certain parts of it have been corroborated by independent sources, . . . [was] as trustworthy as a tip which would pass the *Aguilar* test without corroboration." *Spinelli v. United States,* 393 U.S. 415.

The problem with this, however, is that one using this standard finds only a rather nebulous report as to the Volkswagen, part of which was admittedly inaccurate. We have, with reference to the Cadillac, the fact that the Volkswagen was shown to have been a stolen car and Simpson's possession of a Cadillac that was, when it was originally placed on the market, a different color. The question is, can the police seize this car to determine if it is stolen. The answer seems obvious. The police can no more seize a car "for investigation" than it can seize a man for this purpose.

II. An Intentional or Recklessly Untruthful Misrepresentation Will Result in an Invalidation of a Warrant, the Same Is True of an Unintentional Misrepresentation of a Material Issue of Fact.

First of all, it is conceded, as the State must agree, that when the internal evidence about the informant himself or the information supposedly supplied by him, fails to establish intrinsically either personal credibility *or* informational reliability, other evidence in the affidavit may satisfy the alternate route to probable cause developed in the wake of *Spinelli.* Here, this gap was sought to be bridged by the product of subsequent investigations allegedly made by Detective McComb. Ostensibly, these were undertaken to verify, or corroborate, information supposedly supplied by his informant.

We should look then under *Spinelli,*[6] to the relevant assertions as set forth in the first affidavit. At the risk of

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6. As to this buttressing technique, this Court in *Spinelli,* indicated that, "if the tip is found inadequate under *Aguilar,* the other allegations which corroborate the information contained in the hearsay report should then be considered." The question then is, "can it fairly be said that the tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass *Aguilar's* test without corroboration?" 393 U.S., at 415.

sounding repetitious, we contend that the affiant's actions were deliberate and willful. This is especially so since by his own admission he only put in his affidavit the things he felt checked out. The necessary inference from this is that he intentionally and deceptively left out those things his investigation showed were in conflict with what he reported his "informant" had said. Of interest as to this point, the Record shows that in defending these crucial omissions, this officer brazenly testified that "quite naturally" (R 64), he did not put those things in his affidavit which might have tended to undermine his efforts to show the informer was reliable. In other words, ". . . [He was] not interested in showing . . . [the informant] was not reliable, [he was] interested in showing he was reliable so it was for that reason . . . [he] did not put it in the affidavit." (*ibid.*).

In this same vein, there is McComb's cute testimony that he had not been told, nor had he testified his informant had said, the car Simpson's mother was driving was stolen (R 65-66). Given the fact McComb testified he checked the Title Bureau for cars in the name of the various Simpsons, his testimony that he did not check and determine, before warrants were issued, whether the mother's car was stolen property is at least suspect. This is especially so in view of his express testimony that he expressly checked the records "in regard to vehicles owned by Charles Simpson, by Nancy Simpson, and by Rosa Simpson (R 15). But actually it is more than that. The conclusion that his testimony was perjurious becomes even more irresistable in light of the showing that the written summary of what the informer told him (R 114) (that is, the purported synopsis of what Battle said [R 1193]), credits the informer with having reported to McComb, *before* the warrants were issued, that the mother's car was stolen (R 117).

Thus, to believe McComb was giving anything other than false testimony, and misleading conclusions in his affidavit, this Court must be convinced that when McComb stated he checked on the cars in the Simpson name and found contrary to what his informant had supposedly said, a Volkswagen in the wife's name, that he did not check *at that time* to see whether there was a stolen Chevrolet stationwagon listed to Simpson's mother.

In any event, regardless of the position the Court takes on this point, it must still be recognized that the informant specifically credited the Cadillac car with having been purchased by Simpson from Moyer's whereas the records, checked by affiant, showed it had been purchased from a different dealer in a different county. Add to this the fact that the informant had said the Volkswagen was in Simpson's name and that too turned out not to be true. Neither of these facts were stated in the affidavit, nor was any mention made therein about the misinformation relative to the mother's car.

Add to this Battle's testimony denying that the remarks were his, and the fact that the informant was giving hearsay information that was not exposed to be such in the affidavit, and the issue here becomes most clear.

Surely, then, it must be as obvious to this Court, as it was to the trial court, that the considerable amount of misinformation in the affidavit was deliberate.

The question thus created, one which may be viewed as novel for our courts (at least our research has not uncovered any cases on this point), involves the effect of inaccurate or willfully false statements in an affidavit. A possible explanation for this could be the fact that this Court has not clearly decided this issue. See *Steele v. United States*, 267 U.S. 498, at 501 (1925).

Other courts, however, have concerned themselves with the problems created where, as here, a showing of deception, falsehoods, misrepresentations, or imposition on the magistrate is made. The leading cases on this point include *United States v. Carmichael*, 489 F.2d 983 (7th Cir. 1973); *United States v. Thomas*, 489 F.2d 664 (5th Cir. 1973); and *United States v. Marihart*, 492 F.2d 897 (8th Cir. 1974).

In *Carmichael*, the Court took the position that a defendant is absolutely entitled to show any misrepresentation by the affiant of a material fact in his affidavit, or an *intentional* misrepresentation whether material or not. Further, that if a deliberate misrepresentation is shown, "the Court need not inquire as to . . . [its materiality]." *Id.*, at 988-989. Where the misrepresentation is negligent, or reckless, the *Carmichael* Court would then determine whether it affected the issuance of the warrant (*ibid.*). The Fifth Circuit, in *Thomas*, held that,

> ". . . affidavits containing misrepresentations are invalid if the error (1) was committed with an intent to deceive the magistrate, whether or not the error is material to the showing of probable cause; or (2) made nonintentionally but the erroneous statement is material to the establishment of probable cause for the search." (489 F.2d, at 669.)

The Eighth Circuit Court, in *Marihart*, after considering both of these views, adopted the position as expressed in *Carmichael*. In line with this, they ruled that an intentional or recklessly untruthful, misrepresentation will result in an invalidation of a warrant as will an unintentional misrepresentation of a material issue of fact.

Quite obviously, these rules were designed to test the credibility of affiants whose testimony or affidavits are

before the Court. See Forkosh, *The Constitutional Right to Challenge the Contents of Affidavits in Warrants Issued Under the Fourth Amendment*, 34 OHIO ST. L.J. 297 (1973), and Kipperman, *Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence*, 84 HARV. L. REV. 825 (1971).

Anticipating a possible contention that the decisions above, which clearly authorize an in depth exploration into the asserted basis for the issuance of a warrant, are *merely* Federal cases, and do not apply full strength to state courts, the recent decision of *North Carolina v. Wrenn*, ... U.S. ....., 94 S. Ct. 3180 (1974), may prove enlightening to the prosecutor. Here, the Court was dealing with a state prosecution involving a warrant that on its face satisfied the applicable state statutes and was constitutionally adequate. Although the conviction had been affirmed by the state Supreme Court, apparently in line with the concept that only facial sufficiency was required, the Federal District Court, in granting a Habeas Corpus Writ, saw it as his duty "to rule out erroneous averments in the affidavit and proceeded to test the validity of the warrant in the light of the remaining uncontested averments," and after so doing found the affidavit insufficient. On appeal, the Federal Court of Appeals approved this procedure. This Court then denied certiorari with only two judges dissenting from this action.

Surely then if this type of analysis is given the affidavits in this case, the required conclusion can only be that this argument supports our position, in an alternative way to that urged in Argument No. I.

In dealing with the defense contention that the affidavit contained false, perjurious and willfully deceptive representations, the Court made the interesting holding that:

> "No case has been cited that holds either (1) *all* information given to police officers by undisclosed informants must be stated in the affidavit, or (2) if any information stated by the informant turns out to be inaccurate, the search warrant is invalid notwithstanding the fact that the accurate information standing alone is sufficient to establish probable cause." (*id.*, at page 7.)

In support of the Court's ultimate thesis on this point, the case of *United States v. Damitz,* 495 F.2d 50 (1974), was cited. Apart from the fact that an analysis of the *Damitz* case does not support the Court's disposition on this point, there is the fact that the two premises, upon which the Court structured its syllogism, simply cannot survive close scrutiny.

While the Court is quite correct when it concludes that "no case has been cited that holds . . . (1) *all* information given to police officers by undisclosed informants must be stated in the affidavit", the fact is no case *could* possibly hold that such is a requirement. On the other hand, cases were cited which do hold that a showing of deception or imposition on the issuing magistrate are sufficient circumstances to require the voiding of a search warrant. Those cases include *United States* v. *Carmichael, United States v. Thomas, United States v. Marihart,* and *United States v. Dunning.*

The upshot of these *cited* cases is that our courts should not be deceived, as the magistrate in this case was, into routinely accepting the naked representations of police officers. This is especially so if they are from *Cleveland, Ohio,* where "history has shown that the police acting on their own cannot be trusted".

While this proneness on the part of some of our courts, to accept the oath of a police officer as gospel, and to view as unthinkable the idea that all police are not honest and fair, may have had some high degree of validity in some bygone era when a presumption of regularity and candor concerning law enforcement officers could be invoked. But given the facts of this case, and numerous others (both state and federal, which show members of the Executive or Enforcement branches of government are, after all, humans like the rest of us), the fact that they are policemen is alone a circumstance that should require judges issuing warrants, and those reviewing such actions, to carefully scrutinize their *ex parte* papers.

The federal appellate courts seem willing to impose an affirmative duty on those issuing to see that they are not being deceived (*United States v. Dunning,* 425 F.2d 836). Thus, it comes as a real blow to learn that the trial courts in Ohio are not required to exercise comparable control over those who apply to them for warrants.

Dealing then directly with what counsel regards as the heart of the Court's ruling on this point, the affirmative position here being taken is that *United States v. Damitz* does not stand for the invariable proposition (as the Court of Appeals' opinion can be read to hold) that where there is sufficient accurate information in the affidavit to pass constitutional muster, such is all that is required.

Damitz, to be sure, did look past certain inaccurate portions of an affidavit, and drew the conclusion that apart therefrom the affidavit was sufficient. However, the *Damitz* Court made the point that the affidavit containing the faulty information was that of a third party, "not that of a government agent" (*id.*, at 55). Further, that Court held "the case might have been different if

a government agent had made an affidavit containing material false statements" (*ibid.*).

So structured, it is apparent that *Damitz* is really not in point here. Not only this, the real point can be made by paraphrasing the Court's premise to read: no case can be cited which holds that if certain information is either artificially or correctly attributed to an informant turns out to be inaccurate, or the affidavit otherwise contains intentional falsehoods (or even unintentional misrepresentations) the affidavit *must* be deemed valid if apart from these defects it still contains probable cause.

This brings us back to the Court's original premise that no case was cited showing, in effect, that the existence of falsehoods in an affidavit is sufficient to void a warrant containing enough accurate information to otherwise support its issuance. What the cases of *Carmichael, Thomas* and *Marihart* all agree on is that the relevant considerations are (1) whether the falsehoods were intentional, and (2) whether they were made with an intention to deceive. All of these cases hold that if the falsehoods were intentional (whether on a material point or not) the warrant should be voided.

Then there is the case of *United States v. Belculfine*, 508 F.2d 58 (1974), which was cited to the Court during argument, as a more recent decision in this area. This case also refutes the Court's stated position that "no case has been cited" bearing on these points. As to the *Belculfine* case, it takes the rather strong position that even after having determined "the misstatement in the affidavit as immaterial in the sense of not being a 'but for essential' of probable cause, . . . does not dispose of the case" (*id.*, at 62). This view is, to be sure, diametrically opposed to that expressed by the Court of Appeals in its Journal Entry. (Appendix, p. A9).

In the view of the *Belculfine* Court, although the misstatement related to an immaterial fact, it nonetheless "changed a marginally adequate affidavit into a solidly persuasive one" (*ibid.*). Further, that Court reasoned that "[A] knowing misstatement of so significant a fact would exhibit exactly that quality of unscrupled zeal which impelled the adoption of the exclusionary rule" (*ibid.*).

Even more significantly, the *Belculfine* Court, in what can be regarded as a direct refutation or confutation of the position taken by the Court of Appeals on the same point, reasoned that:

> "Were the judicial response to be merely the elimination of the false statements and the assessment of the affidavit's adequacy in the light of the remaining averments, enforcement officers would be placed in the *untoward* position of having everything to gain and nothing to lose in strengthening an otherwise marginal affidavit by letting their intense dedication to duty blur the distinction between fact and fantasy. We therefore see no supportable alternative to suppression of evidence obtained pursuant to a warrant based on an affidavit containing an intentional, relevant, and nontrivial misstatement. *We see no basis for confining this sanction to false statements made with the specific intent to deceive the magistrate as opposed to false statements merely intended to 'round out the picture.'* We see no danger of frequent frustration of warrant-based searches and seizures occasioned by challenges based on intentional misstatements. Such challenges, to be entertained, would have to be preceded by a showing of falsity of allegation—a showing presumably not easily to be made in most cases." (*Id.*, at 63.) (Emphasis added.)

III. The Right of Confrontation and the Hearsay Rule Are Both Violated When a Crucial Witness Is Allowed to Relate As Substantive Evidence the Contents of Conversations Had With an Undisclosed Informant, and With Others—Including a Judge and the County Prosecutor.

So that this aspect of our Petition can be properly structured, the factual background for the above contention, in the first instance, relates to the following segment of the Record:

> Q. . . . Will you tell the Court and jury how your investigation or involvement in this matter began?
>
> MR. WILLIS: Objection.
>
> • • • • •
>
> MR. WILLIS: [Out of the hearing of the jury] I guess he is going to say some informer told him something. I don't know who it is he is going to be talking about. I am objecting.
>
> MR. LIPOLD: Of course, we have to get started somewhere. We have to start out where he started.
>
> MR. WILLIS: I don't think we should start with some unnamed informant that you are going to resist, make every effort to resist [disclosing].
>
> • • • • •
>
> THE COURT: The objection is overruled. You may answer.
>
> THE WITNESS: I was directed by Sergeant Dierker to conduct an investigation into the possibility that Mr. Simpson was involved with some stolen automobiles.
>
> • • • • •

> Q. All right. Now, after that what happened as far as your investigation is concerned? Particularly calling your attention to October 10, 1972, did anything happen on this day in relation to this investigation?
>
> MR. WILLIS: Objection.
>
> THE COURT: All right.
>
> THE COURT: [at side bar] What is the ground for your objection, Mr. Willis?
>
> MR. WILLIS: I anticipate he is going to say on that day he met with an informant who gave him information. This is precisely what he testified to on the motion to suppress.
>
> THE COURT: Will you please repeat the question?
>
> (Question read.)
>
> THE COURT: The objection is overruled. You may answer.
>
> A. Yes, something did happen.
>
> Q. What was it?
>
> MR. WILLIS: Objection.
>
> THE COURT: Overruled.
>
> A. On September—excuse me, on October 10, 1972, Detective Tesar, Sergeant Dierker and myself met with an informant who related—
>
> MR. WILLIS: Objection.
>
> THE COURT: Overruled.
>
> MR. LIPOLD: Continue.
>
> A. —who *related information to us in regard to some particular automobiles that were owned by Mr. Simpson.*
>
> Q. Now, what automobiles did you receive information relative to?
>
> MR. WILLIS: Objection.
>
> THE COURT: Overruled.

A. *A particular Cadillac automobile, a Volkswagen* automobile, a Porsche automobile, a Corvette automobile was mentioned. I believe a Chevrolet stationwagon was mentioned. There may have been others. I believe that was substantially it.

Q. This information, or whatever it was that you received at that time, as a result of it, what if anything did you do?

MR. WILLIS: Objection.

THE COURT: Overruled.

A. The following—well, I believe it was the following day we went to the Cuyahoga County Title Bureau, that is Detective Tesar and I.

Q. For what purpose? A. At the title bureau, I conducted an investigation into their records of automobiles owned by the Simpson family, that is including Charles Simpson, his wife Nancy, and his mother, Rosa.

Q. Did you find any such titles? A. Yes. I found a number of automobiles that were titled, either actively or dormantly, in their name (R 1916-1920).

Thus, the Record reveals, even to a casual student of the due process spectrum, that the thrust of the above sequence was to suggest that an informant's disclosures were completely vindicated by the officer's investigation.

The question then is, did the State's intentional use of this evidence violate the petitioner's right of confrontation. Any evaluation of this issue must, of course, start with a consideration of the cases of *Pointer v. Texas*, 380 U.S. 400 (1965), *Douglass v. Alabama*, 380 U.S. 415 (1965), and *Smith v. Illinois*, 390 U.S. 129 (1968). The upshot of these cases is not only to the effect that an accused is entitled to confront any witness whose declarations are weighed against him; he is entitled to cross examine them.

Not only this, by virtue of *Smith v. Illinois, supra*, an accused is entitled to have any such witness completely unmasked.

As applied here, it is at once apparent that to the extent the informer's information supposedly supplied (or to the extent Detective McComb credited him with being the source thereof) added *any* weight to the prosecutor's case in a manner not subject to cross examination, it violated these principles.

Here, of course, there was not only an inability to cross examine the alleged informant to whom the impermissible disclosures were attributed, this wrong was aggravated by the fact that at the time the questions were asked the prosecutor knew he would resist any disclosure request. Surely this makes his having asked these questions deliberate. In our judgment, this was an act of inexcusable misconduct.

In any event, it was because of these questions, asked with the Court's aggressive approval, that counsel made the Motion for a Mistrial, the denial of which is assigned as error. Here, it was contended:

> "I . . . move for a mistrial at this time because of certain statements that have been permitted into the record over my objections.
>
> There has been testimony elicited from Mr. McComb about information supplied to him by informers, whose identity has been withheld from counsel. This violates, in my judgment the admission of this, the defendant's right of confrontation. I think it is under the 6th Amendment. It also violates all of the rules that I know with reference to the admission of hearsay testimony.

Also, the same objection and motion for mistrial is made for the same reasons as it pertains to conversations had with Mr. John T. Corrigan.

The obvious thrust of this examination was to suggest that Mr. Corrigan had affirmatively approved and deemed sufficient the information that had been supplied by Mr. McComb and the informer to him and I don't think that was appropriate.

* * * * *

All this testimony about the basis for the search warrant was certainly unnecessary and prejudiced the defendant's right to a fair trial.

Because we have the injection of Judge Matia as another factor bolstering the efficacy of the police efforts insofar as the seizure of these cars is concerned.

I don't think the State was entitled to present that evidence and I feel it violates the defendant's right of confrontation.

* * * * *

Also, I might add that in view of the evidence that has already been permitted from Mr. McComb, about an informer, if the Court is disposed to reject my motion for a mistrial, that the Court rule . . . whether I am ever going to be supplied with the identity of this fictitious informer, if he is anybody other than Battle—fictitious is my judgment—in order that I be in a position to properly examine Mr. McComb.

I have to know whether or not this so-called informer exists before I embark on my cross-examination. I have to also know what his attitude is based on my interview with him and all of these things are necessary if I am to have an adequate opportunity to cross-examine Mr. McComb.

I cannot assume the burden of cross-examining this man, knowing that he is going to be giving the fantastic leadway he has been given today by the Court to credit an informer with having told him things. And I have no way, absolutely no way of verifying this.

So, therefore, I can't ask him any questions because I am at his mercy, if I ask him questions about what some informant told him.

Mr. McComb is not the type of person at whose mercy I want to be." (R 1945-1949).

These motions, as were virtually all but the most elementary, were denied. Here, the Judge again exposed his apparent lack of comprehension of either our objections or of the willfulness of the prosecutor's tactics. If it were otherwise, there is just no way the Court could have possibly concluded, in response to a facet of these motions that, "there was no testimony relative to the content or actual words that passed back and forth" as between the prosecutor and the Judge who issued the warrant (R 1961).

As to this expressed view by the Court, see *Favre v. Henderson*, 464 F.2d 359, 362 (5th Cir.), *cert. denied*, 409 U.S. 942 (1972). In *Favre* a policeman was allowed to testify that his pursuit of the defendant was caused, at least in part, by information obtained from two reliable informants, but he did not testify as to the content of his conversations with the informants. *Id.*, at 360-61. The court found that a logical inference from the testimony would go beyond identification of the defendant to an inference of guilt and thus, that the implied statements were hearsay as offered to establish guilt. *Id.*, at 362. Admission of the testimony violated defendant's Sixth Amendment right to confront the witnesses against him and, therefore, was reversible error. *Id.*, at 463.

Surely it must be apparent that the *Favre* case is almost on all fours with the case here, at least insofar as the impermissible use as proof of guilt of the necessary inference flowing from this type of evidence is concerned.

Despite this, our Court of Appeals, in resolving these very serious problems involving confrontation and hearsay, apparently concluded that the *Roviaro* principle can be extended to authorize a police officer to report to the jury the substance of his conversation with an undisclosed informant, the County Prosecutor and a Common Pleas Court Judge. Apparently, this would not deprive the accused of a fair trial, if (as was the case with the false statements in the affidavit) "there is enough evidence to convict without the information" to which this argument was addressed.

The fact is there is no way to say how much the jury may have been influenced by McComb's testimony that he screened the objected to hearsay with the judge and prosecutor.

At least this much is certain, the Court was specifically directed to *Favre v. Henderson,* 464 F.2d 359 (1972), which involved a situation somewhat comparable to ours—only not nearly as bad. In *Favre,* unlike the officer in our case, the testimony was simply that the dedendants in that case had become targets because of information supplied by informants. No testimony was given as to the contents of the witness' conversations with these informants. Stated another way, the hearsay itself was not admitted as substantive proof.

In our case, this is exactly what occurred. The result in the *Favre* case was that a logical inference from this testimony was that of guilt. Yet, the same issue becomes harmless error in our case. This despite the fact that the prosecutor's justification for asking these questions really does not make sense.

IV. A Trial Court Cannot, Consistent With the Requirements of Due Process, Sanction the Nondisclosure of the Identity of an Alleged Informant Where It Appears Necessary (1) to Avoid the Risk of False Testimony, (2) to Secure Useful Testimony, or (3) It Is Essential to a Fair Determination of a Cause or Issue.

In *Scher v. United States,* 305 U.S. 251, at 254 (1938), the Court concluded, and we surely recognize this as the fact, that:

> "Public policy forbids disclosure of an informant's identity unless essential to the defense, as, for example, where this turns upon the officer's good faith."

Next, in commenting on this same thesis, the Court, in *Roviaro v. United States,* 353 U.S. 53, at 60-61 (1957), concluded that "where the disclosure of an informant's identity . . . is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way."

Thus it is that regardless of the known penchant of most of our judges to allow the police to decide whether disclosure is required, the law has determined that whether disclosure is required depends upon the circumstances of each case. This perforce involves a balancing of the public's right to the flow of information and the requirement of providing a fair trial to the defendant. In this sense, it follows that an informer's "identity cannot be concealed from the defendant when it is critical to his case." *Branzburg v. Hayes,* 408 U.S. 665, at 668 (1972).

Thus, the test that emerges from these cases is that where there is a reasonable probability that the informer can give testimony necessary to a fair determination of a material issue (see 51 *Federal Rules Decisions* 378), the

burden is on the prosecution to show that the informer cannot supply any relevant evidence.

If the above reasoning is valid, then there is really no way to deny that disclosure can be constitutionally required. This being the case, it is only necessary to determine whether circumstances requiring disclosure are present here.

Given the Motion to Suppress, as amplified by Battle's evidence that he did not supply the "information" attributed to him by "the informer," and the Court's flat recognition that the summary of the informer's information was a "purported synopsis of what Battle supposedly had said" (R 1193); as well as the intimation in McComb's testimony that the informant may have been a police officer (R 128), it is apparent there were sufficient circumstances here to raise a legitimate question as to whether McComb committed perjury not only when he testified (if he did) before the issuing magistrate, but also in his testimony at this trial. Surely, this question could not be resolved merely by accepting the officer's testimony that he would not reveal his informant's identity (R 68) as the sole basis for the Court's decision not to require him to do so (R 2065).

In addition, since McComb and Battle both testified to facts which were in contradiction to certain segments of the informant's summary, the defense right to interview the "informer" to have compulsory process *Washington v. Texas*, 388 U.S. 14 (1967), and to cross examine him *Chambers v. Mississippi*, 410 U.S. 284 (1973), were frustrated.

In this case, the Record is clear, there is no way to know what the posture of the defense would have been if disclosure had been required. Nor is there any way to know what the informer's testimony would have been if

the defense had had the benefit of the person's evidence. It is also quite possible, we contend, that the officer made up this informant (and Battle's testimony leaves no other option), in order to camouflage certain ulterior motives.

Here, too, the Record is clear that the Court did *not* make a determination that there was a legitimate basis for nondisclosure. Nor did the Court even seek to determine whether, in spite of our stated position (R 2511 *et seq.*), disclosure would not have been of any possible benefit to the defense. We contend, therefore, that these failures of the Court cannot be said to be only an abuse of discretion, but they also must be viewed as a denial of the right to the compulsory process for the presence of witnesses, and as a violation of the right to confrontation.

Furthermore, the failure of the prosecutor to disclose, especially in view of our affirmative efforts to gain such information (even apart from the Court's unwillingness to insure a fair trial for this petitioner) amounts to the suppression of evidence. Stated another way, we contend it was prosecutorial misconduct within the meaning of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972) to withhold information which was at the very least material to impeachment of certain crucial prosecution witnesses.

The fact that the prosecutor also asked questions eliciting information which was specifically attributed by their witness to the informant, whose identity he did not intend to disclose, only aggravates his misconduct.

At least this much is certain, the testimony rendered by Detective McComb and by Tyrone Battle was both crucial to the State's case and extremely damaging to the accused. To this extent their credibility was a major factor, one of vital importance to the petitioner. Given these

undeniable facts, if the defense was entitled to disclosure, any belated argument that the ultimate effect of the Court's rulings denying disclosure and the other related aspects was harmless error has to be regarded as sophomoric. The same would be true of any allied contention that the prosecutor should be excused for not knowing better.

Again, so that our position may be clear, we contend as to this segment of our petition, that for the informer privilege to be deemed controlling, or otherwise applicable, it must be properly asserted (a situation that did not occur here) *and* the Court is at least required to make meaningful findings both as to the propriety of the assertion of the privilege and as to whether the information sought would be "relevant and helpful" to the defense.

Yet, in this case, for reasons that were not articulated, the trial court, solely on the basis of the officer's testimony and the prosecutor's unsupportable argument, not only specifically denied the defense information as to the informer's identity, the Court otherwise frustrated our efforts to determine his identity by grievously limiting our cross examination of the officer. This untenable position the Court maintained even after the State's chief witness denied having made certain remarks supposedly attributed to him by the informant, and after it was further shown that certain factual assertions credited to the informant were either *not* in his "written summary," were *not* factual, or were misrepresented in the affidavit for search warrant.

All this points to crucial flaws in the Court's summary assessment of this situation. For, if under *Roviaro v. United States*, the Court had the duty "of balancing the public interest in the flow of information against . . . [Simpson's] right to prepare his defense" (353 U.S., at 62); then surely such requirement is clearly at odds with the

arbitrary and indefensible position taken herein. Reference here, of course, is being made to the Court's spontaneous ruling that disclosure would not be ordered.

Again, the fact that the Court maintained this adamant position is even more startling after the Court permitted Detective McComb to testify, in the presence of the jury, over defense objections as to information supposedly supplied him by the informant during the course of his investigation. *Pointer v. Texas*, 380 U.S. 400 (1965).

Be all that as it may, there is just no way it can be concluded that the judicial task of seeking fundamental fairness could in this situation ever be achieved where a police officer is given the power to decide both what is privileged and whether the defense is entitled to evidence which so obviously could be put to beneficial use.

Under the proper standard the trial court's ruling can only be justified, if it had been shown that the informer's evidence did not relate to *any* of the deciding factors upon which a conviction or acquittal could rest. In addition, it had to be affirmatively shown that *any* possible testimony by him was grossly outweighed by the factual considerations favoring nondisclosure in the public interest.

Given these tenets, for any court, including this one, to deal impartially with and balance such conflicting interests, some knowledge was required as to what relevant information the informant actually possessed. Since the Court was not aided by *any* evidence from which it could have possibly resolved these issues against the petitioner *impartially*, it can only follow that the Court must have indulged in a judicial guessing game when it ruled in favor of nondisclosure at the expense of Simpson's right to a fair trial. See *Jencks v. United States*, 353 U.S. 657, at 671 (1957).

If such were not the case, at least this much is certain; the record in this case shows no basis (absolutely none) for the trial court's decision against disclosure. Given even an equiponderant interest between the public and the accused, it seems only fair that due process would require a fuller analysis than has been given to this issue. Surely then an apparent finding that the public interest required that the identity of this informer not be disclosed can never be delegated with impunity to the witness as has been attempted here.

While it is true, as a basic premise, that the range of conduct prosecuted by our criminal statutes is broad, the danger in most situations of violent repercussions against witnesses really does not present any significant objection to disclosures of their identity. Thus, the sensible requirements are that the State has no interest in denying an accused access to all evidence that can throw light on the issues involved in his case. See *People v. Riser*, 47 Cal. 2d 566, 305 P.2d 1, at 13 (1956). Here, of course, given the possibility that the informant was a police officer (R 128), it does seem strange that due process could really require that he remain anonymous.

As to this possibility, the case of *United States v. Leichtfuss*, 331 F. Supp. 723 (1971), seems to be directly in point. Here, the United States Attorney opposed a request for the names and addresses of potential government witnesses, all employees of the government. The Court, in granting the request, ruled that "certainly there is no apparent threat that disclosure of the identity of these witnesses . . . will subject the witness to physical . . . harm or to threats designed to make him unavailable to testify or to influence him to change his testimony." Also see *Will v. United States*, 389 U.S. 90, at 96. There, this Court recognized that *where it is shown* "that such disclosure will

involve physical risk to individuals" (389 U.S., at 101) such is a circumstance that must be dealt with.

These cases and others seem to require a showing of at least probable cause to believe the danger of intimidation exists. Even when such danger does exist, the requirements of due process are that where the information sought is "relevant and helpful to the defense of any accused, or is essential to a fair determination of a cause, the privilege [of nondisclosure] must give way." *Roviaro v. United States*, 353 U.S., at 60-61. In this latter situation the prosecution acquires the choice, either surrender the information or "dismiss the action" (*ibid.*).

Still another court that has dealt with the question as to whether disclosure can be required is the Supreme Court of Illinois. In their decision (*People v. Lewis*, 20 Ill. App. 3d 161, 313 N.E.2d 170 [1974]), they dealt specifically with the prosecution's refusal to disclose the identity of their informer on the ground that his life had been threatened.

The Court reasoned that, "the desirability of calling . . . [the informant] as a witness, or at least interviewing him . . ., was a matter for the accused rather than the government to decide." If the State's contention that disclosure cannot be compelled were valid, "a defendant would never be entitled to know the informer's identity, for they could always claim [as they always do in Cleveland, in even the most routine cases] that disclosure would place the informer's life or health in jeopardy."

After reasoning it was unfair to refuse to afford a defendant the opportunity to decide for himself whether the informer could provide testimony helpful to the defense, the Court concluded that the State's interest in protecting informers and the flow of information they provide was

insufficient to justify denying disclosure of their identity where the same is required is a violation of constitutional rights.

Such being the law elsewhere, it remains strange how, in this case, the issue can be said to turn solely on the basis of the conclusory assertions made by a witness whose testimony portends, as this officer's does, the very real possibility that his evidence was perjurious.

During one of the arguments made in quest of disclosure, counsel stated:

> "I don't think that the Court can properly put the defendant in a position of withholding from him relevant evidence. The test as I see it, in the light of *Alderman* [*Alderman v. United States*, 394 U.S. 165 (1969)], in the light of *Reynolds* [*United States v. Reynolds*, 345 U.S. 1 (1953)], and in the light of the Sirica opinion in the *Nixon* case [360 F. Supp. 1 (1973)], this evidence is arguably relevant. We have a right to know who the informer is.
>
> My right to cross-examine McComb is seriously curtailed if I can't raise the foundation to impeach him.
>
> Apart from that aspect, we have the testimony of Mr. Battle that he did not relate any of this information to anybody and yet the statement credits Battle with having contributed all this information." (R 2057).

As our sagacious prosecutor saw it (and this was the ultimate basis for the Court's decision [R 2067]), the principle involved in these cases "is entirely different from the matter now before this Court. It is not even similar. There, [they] are talking about an executive privilege." (R 2059-2060).

Aside from exposing a lack of substantive knowledge as to the basic thrust of these cases, the prosecutor's stated view likewise reveals a total lack of comprehension of the analogy between the privileges involved. In our case, the question dealt with the witness McComb's inferential assertion of the informer privilege against our request for the disclosure of his alleged informant's name and whereabouts. In the *Nixon* case, which was affirmed in *Nixon v. Sirica*, 487 F.2d 700 (1973), the question there was whether the executive privilege was a sufficient barrier to the disclosure of certain tapes.

Thus, the issue in both cases involved a determination as to whether the person asserting the privilege (The President, in *Nixon*, or McComb, in our case) was the sole judge as to whether disclosure was required.

In *Nixon*, Judge Sirica, after rejecting the contention that, "it is the executive that finally determines whether its privilege is properly invoked," went on to conclude in language that is surely apt here, that, "the availability of evidence including the validity and scope of privileges is a judicial decision." (360 F. Supp., at 5). Next, the Court, relying on the *Reynolds* decision (deemed inapt to this situation by our prosecutor), concluded that judicial control over evidence in a case "cannot be abdicated to the caprice of executive [which of course, includes enforcement] officers" (*ibid.*).

In further amplification of this point, it was then stated, "[F]or the courts to abdicate this role to the President or anyone else, to make each officer the judge of his own privilege, would dishonor the genius of our constitutional system and breed unbearable abuse." (*Id.*, at 5-6).

In approving this concept, the Court of Appeals reasoned (contrary to the position taken by the President that

his "mere assertion of the privilege . . . [was sufficient to overcome the need of the party subpoenaing the documents"]) that "the courts have repeatedly asserted that the applicability of the privilege is in the end for them and not the executive to decide." (487 F.2d, at 713).

The upshot of these cases, including *Reynolds*, is that, "the Court itself must determine whether the circumstances are appropriate for the claim of privilege." (*Id.*, at 714).

Given then the trial court's refusal to require disclosure, even in the face of its apparent relevance to many of the issues in this case; as well as, our strong showing of need (a factor stressed in *Nixon*, 487 F.2d, at 717) there does not appear to be any possible basis for approving the trial judge's thesis in this case—that is, that McComb would not be required to disclose because he did not want to.

At least this much is certain, the disclosure requested here was essential both to a fair trial and to the integrity of the verdict that has been returned. See *United States v. Hurse*, 453 F.2d 128 (1972), and *United States v. Jackson*, 384 F.2d 825 (1967). In our judgment then, any one of the flaws developed in this segment of the Petition furnished a sufficient basis for a reversal.

Despite this, the Court of Appeals' point in rejecting the above argument must be that unless the defense can show that an asserted informant was a participant in the transactions involved in the trial his identity need not be disclosed. Here, too, the Court has created a basis for rejecting a defense argument that differs from that expressed by the trial court.

While no one can dispute the fact that it is proper to look at all the facts and circumstances in resolving the

merits of an issue, still one is prone to feel he has been ambushed when the trial court takes one position, which is indefensible, and the Court of Appeals says he was right but for different reasons.

However, in this case, *Roviaro* cannot be regarded as the complete answer to these contentions. Also, it is not the rule of *Roviaro* that disclosure is only required when the informer was a participant.

A close reading of *Roviaro* and its progeny show that the principle of nondisclosure of relevant evidence cannot stand as a bar to the disclosure of relevant evidence in a criminal cause. The case of *Nixon v. Sirica*, if it stands for anything, certainly stands for this principle. Thus, the question the appellate Court should have answered, for itself at least, is how can it be said with impunity that "the only purpose the informant could have served at trial would have been to impeach Officer McComb's testimony respecting the original lead in the case" (*Journal Entry*, Appendix, p. A11).

Obviously, the Court of Appeals chose to ignore the fact that disclosure was sought in order to impeach not only McComb on the merits, but Battle as well. Indeed, one of the strongest arguments made during the trial for disclosure dealt with our inability to cross examine McComb about the statements he related to the jury that had been told to him by the informant, which statements he screened through the prosecutor and the judge (R 1945-1949).

Given the Court's failure to deal with the confrontation facet of our contentions, the Court's conclusion as to the "only purpose" disclosure could have served seems out of line with the facts of this case.

V. It Is a Violation of Due Process for the Court to Resort to Disjunctive Language in Charging the Jury Where Such Language Creates Affirmative Theories Upon Which a Verdict of Guilt Could Be Based.

Simpson was found "guilty as charged by the Judge" of receiving, buying, operating, *or* concealing the motor vehicles, particularized in two counts, with knowledge that they were stolen. Of course, even a cursory reading of the controlling statute reveals that one who *either* receives, buys, operates, *or* conceals a motor vehicle with the requisite knowledge commits a crime.

Stated another way, a crime is committed if any of these alternatives is committed. Necessarily then, since Simpson was charged in each of these counts with more than one crime, it follows that he was substantially prejudiced by the Court's failure to properly segregate the charges to the jury. Not having been properly instructed, it is possible that some of the jurors may have concluded that Simpson was guilty because he received the car with the required knowledge, while those not so believing could have concluded it was because he concealed it with such knowledge. In such an event, guilt could, and very probably was, determined on less than the required unanimity as to any of the particularized crimes charged. This is especially so since in essence four crimes were charged and obviously created other possibilities in addition to the ones suggested above.

Even as a general proposition it has been held that two or more separate and distinct offenses cannot be joined in a single count of an indictment. The vice of so charging an accused is that of duplicity. *Parker v. Maxwell*, 174 Ohio St. 471 (1963); 28 OHIO JUR. 2d 473.

Now admittedly, it has been deemed permissible, and not duplicitous, where it is shown that the statute involved prohibits the doing of an act in several different ways, and the indictment charges these *conjunctively* with having been committed by the accused. *State v. Daniels*, 169 Ohio St. 87 (1959). More specifically, in *Crain v. United States*, 162 U.S. 625, this Court ruled that it could perceive no sound reason, "why the doing of the prohibited thing in each and all of the prohibited modes may not be charged in one count, so that there may be a verdict of guilt upon proof that the accused had done any one of the things constituting a substantive crime under the statute."

While we agree that it is not duplicitous where the prohibitions are pleaded *conjunctively*, *State v. Daniels*, *supra* (also see *Kitchen v. United States*, 272 F.2d 757, 751 [1959]), a real problem necessarily must be deemed to have been created where the *disjunctive "or"* is used in phrasing the charges. Here, of course, direct reference is being made to the fact that not only did the indictment use the disjunctive *"or"*, the Court specifically charged the jury that Simpson could be convicted if they were persuaded that he "did receive *or* buy *or* conceal" the Cadillac. And the same finding could be made if they determined he did "receive, buy, *or* conceal *or* operate the Volkswagen (R 2710-2711), in this case (Emphasis supplied).

Again, the real crux of our position here is that the Court's charge does not simply set forth different modes of committing the same offense, the charge sets forth at least two different offenses. This necessarily follows even if we concede that it is proper to charge that one violates *R. C. of Ohio*, §4549.04(E) if he "receives, buys, and operates" a stolen vehicle. Where, however, the jury is charged, as was the case here, that guilt can be deemed established if the accused either received, purchased, and

operated *or* if he concealed the stolen vehicle, there is simply no way it can be ascertained from a general verdict the crime the accused was convicted of. In *Ackley v. United States,* 200 F.2d 217, at 221, the Court held that to charge that a defendant did one thing or another makes the indictment bad for uncertainty. Also see *Wilborg v. United States,* 163 U.S. 632, 648. This case supports the concept that although two charges were made in one count, where the court charges the jury that the evidence would justify a conviction on only a specified one of these, the verdict would not be disturbed. The point in citing this case is to emphasize the fact that counsel sought to have the Court require the State to elect from among the different charges (R 175). This the Court refused to do, as a reading of the charge amply reveals.

The question then must be, especially since this was done in spite of a defense request for specific clarification of the charges, whether substantial rights of the accused were breached.

Judging from the reception our argument that this indictment was duplicitous (R 2667-2670) received at the trial level, the danger does exist that our point is not being comprehended. On the other hand, the point being raised, at least to some degree, was developed in *United States v. Thompson,* 422 F.2d 1104 (1970). Here, the Court was dealing with charges involving transporting a stolen motor vehicle *and* concealing a motor vehicle.

These charges are comparable to concealing a stolen car, operating a stolen car and purchasing a stolen car. *All* are separate crimes. This being the case, each would require the proof related specifically to the particular crime to satisfy constitutional requirements. *In Re Winship,* 397 U.S. 358 (1972).

What this does then is dramatically expose the vice involved in the mere submission of more than one charge in a single count. And, of course, it makes the submission of these alternatives an even greater wrong. This is so since there is just no way one can determine precisely which charge the jury, if they did, unanimously agreed he was guilty of with reference to any of the various counts involved in this trial.

The response of the Court of Appeals to this argument simply cannot survive any meaningful scrutiny. To begin with, a careful reading of the Court of Appeals' Journal Entry shows they selectively segregated from the various alternatives given the jury, certain facts and then reasoned, in an *ad hoc* fashion that produces the following logic: (1) that knowledgeable concealment of a stolen car both before and after March 20, 1972, is a crime; (2) that although the trial court instructed the jury that Simpson could be convicted if they found he had knowledge these cars were stolen *or* even reasonable grounds to know this, *and* if he, on or about October 27, 1972, either purchased, received or concealed these cars. From these premises, the Court then concluded that since there is sufficient evidence in the Record to support Simpson's conviction on the theory that he *concealed* these cars with knowledge that they had been stolen his conviction can be approved.

This syllogism, we contend, is plausible only on its surface, because the Court's premises do not justify the ultimate conclusion reached. This is so for a number of reasons. To begin with, the Court's reasoning pattern can be classified as a *non sequitur*. This is so because *it does not follow* that because one can pick and choose from amongst the alternatives given the jury, and select a course that does not conflict with fundamental criteria that this is what the jury did.

The Court also appears to have fallen into the logical fallacy known as "the fallacy of the undistributed middle." This is so because the Court's conclusion does not adequately deal with the shared middle premise. This premise (No. 2 above) gave the jury options other than those absolutely essential to the logical validity of the Court's ultimate conclusion. So structured, it could not be clearer, the fact that the jury may have reasoned as the Court did no more justifies the conclusion they did so than it supports the idea they selected one of the other alternatives.

Again, the Court says there is "sufficient evidence for reasonable minds to conclude, as the jury did, that. . . [Charles Simpson] was guilty of concealing the automobiles on October 27, 1972, knowing they were stolen" (*Journal Entry*, Appendix, p. A13).

Aside from the fact that the evidence showed his wife purchased the Volkswagen without his participation, there is the fact that no one can really say Simpson was convicted "of concealing" as distinguished from some of the other alternatives given the jury. Here, of course, reference is being made to the fact that the Court instructed the jury that Simpson could be convicted if they found that he did receive *or* buy *or* conceal the Cadillac. This same finding was authorized if they found that he did "receive, buy *or* conceal or operate the Volkswagen" (R 2710-2711). Since the jury was given these choices, how can it be realistically held that they must have convicted him of concealing only.

The Court's stated position is self-refuting. For given "the presumption of regularity" the Ohio Supreme Court attributes to the actions of trial judges (See *Coleman v. McGettrick*, 2 Ohio St. 2d 177 [1965]), it has to be supposed that the trial judge's unwillingness to strike the alternatives to concealing from the indictment, can only be because he was convinced there was sufficient evidence in the Record to support a conviction on those points as well. If it were otherwise, the trial court, under Rule 29, Ohio Rules of Criminal Procedure, would surely have eliminated these alternatives.

VI. A Law Which Alters the Rules of Evidence So As to Permit an Accused to Be Convicted Upon Less, or Different, Evidence Than Was Required When the Charged Crime Supposedly Was Committed Is Invalid as Ex Post Facto.

More simply put, the contention here being made is that it was a violation of due process to convict Charles Simpson for violating a law that was not in existence on the date the alleged criminal conduct in issue occurred.

As an example of what is here being contended, it has been expressly held that a change from a rule requiring corroboration of the testimony of an accomplice to one abolishing such requirement violates this prohibition. *Plachy v. State*, 91 Tex. Crim. R. 405, 239 S.W. 979 (1922). Still another facet is where there is a change from a rule requiring conviction only on the direct evidence to one allowing conviction on either direct or circumstantial evidence. Such a change is *ex post facto* as to past offenses. See *State v. Johnson*, 12 Minn. 476 (1867).

The fault characteristic in the above examples involves retroactive changes which operate to the disadvantage of the accused by making his conviction easier. Quite obviously then, it was for this reason that this Court, in *Thompson v. Missouri*, 171 U.S. 380 (1898), concluded that a statute which changes the burden of proof on the prosecution from the rule of beyond a reasonable doubt to one of preponderance of the evidence is *ex post facto* if retro-

active. Also see *Kring v. Missouri*, 107 U.S. 221 (1883). (Old law, in effect at time of offense, provided that on a charge of first-degree murder a guilty plea of second-degree murder operated as an acquittal of first-degree murder, even if the plea is later set aside; new law passed after offense, provided that if the plea is set aside, new trial may be had for first-degree murder; *held, ex post facto*, as the change deprives defendant of a substantial right.)

Of no mean significance then to the overall thrust of this appeal is the indisputable fact that there was no evidence showing either the receiving, or the operating, of the Cadillac (Count II) *after* March 20, 1972. The State's evidence was designed to show Simpson received this car from Battle (through Kaiser Houston) in early December, 1971, the day after Battle says he stole it (R 742, 748-750). Petitioner's evidence was that he made the purchase on February 10, 1972 (R 2425).

The point of all this is that the statute then current was *R. C. of Ohio*, §4549.04, which became effective on March 20, 1972. This statute provided, so far as is relevant here, that:

> "No person shall receive, buy, operate, conceal, or dispose of a motor vehicle that was obtained by means of an auto theft offense, knowing *or having reasonable cause to believe* it to have been so obtained." (Emphasis supplied.)

The statute repealed by the above enactment provided that:

> "No person shall commit any of the following acts: . . .
>
> (B) Purposely take, drive, or operate any motor vehicle without the consent of its owner;

> (C) *Buy or conceal* any motor vehicle that has been stolen, knowing it to have been stolen . . ." (Emphasis supplied.)

The distinction between these two statutes results from the fact that the old statute prohibited (insofar as is relevant here) the purchase or concealment of a car *"knowing it to have been stolen."* (Emphasis supplied). The *then* new statute, which repealed and replaced its predecessor, enlarged the crime from "buy or conceal" a stolen vehicle knowing it to be stolen, to "receive, buy, operate, conceal or dispose" of a stolen vehicle. Not only this, the new statute changed the standard *from* knowing the vehicle was stolen *to* either knowing or "having reasonable cause to believe" it was a stolen vehicle. It was on this latter standard that the Court instructed the jury (R 2714).

Thus, the point here being made has at least two undeniably relevant features. Insofar as the charge, as particularized, included aspects other than purchase and conceal it must be regarded as *ex post facto*. The same is true of that facet of the Court's charge which altered the standard of persuasion from knowing the vehicle was stolen to "reasonable cause to believe" it was stolen.

This is so because Simpson could not be constitutionally convicted on the basis of acts allegedly committed by him before the date the law under which he was prosecuted and convicted became effective. Nor could he be convicted on the basis of a less rigid standard of proof than existed at the time he committed, if he did, the acts charged in this indictment.

The crucial question then is whether the retroactive application of the successor statute, to acts attributed to Charles Simpson, violates the constitutional prohibition

(U. S. Const. Art. I, §10) against *ex post facto* or retroactive laws.

In fully assaying our position, it is beyond dispute that the prohibition to which reference has been made includes any law that alters the legal rules of evidence, or receives less, or different, testimony, than the law required at the time of the commission of the alleged offense in order to convict the alleged offender. See *Calder v. Bull*, 3 U.S. (3 Dall) 386, at 390 (1798).

The clearest possible example of an *ex post facto* law then would be one which creates a new crime and then applies it retroactively to conduct not criminal at the time it occurred. Obviously then this same result would apply in a situation, like the one here, where the statutory crime in existence at the time an alleged act was committed required that it be done "knowingly," and the requirements of the successor statute would be satisfied if it were simply shown the person had reasonable cause to know.

This argument applies full strength to the Volkswagen. Here, the charge was that Charles Simpson and his wife, on the 27th of October, 1972, "did receive, buy, conceal or operate" this car (R 2763). The evidence as to the purchase of this car also showed Nancy Simpson both purchased and acquired possession in September, 1971 (R 2270, 2287-2288, and 665 *et seq.*).

This being the case, if she received this car with the requisite knowledge it had to have occurred, at the latest, on this date. Thus, any criminality involved in her having done so has to be measured by the actual "knowledge" feature in vogue at that time. To substitute reasonable cause to believe for knowledge, as our Judge did, surely and clearly violates the *ex post facto* prohibition.

Here, again, our Court of Appeals has taken a position which, in our judgment, is unrealistic. This end they accomplished by stating the wrong questions and then giving what may very well be the right answers to such questions.

Be all that as it may, the real question (the one that supplies an undeniable flaw characteristic to the Court of Appeals' resolution of this specific contention) is not whether there was sufficient evidence to support a conviction for "concealing the automobiles on October 27, 1972." Rather, a more apt question is how can any Court make the determination from the general verdict returned in this case that the guilty verdicts were unanimously predicated on concealing. And that the jury's consideration of the unconstitutional alternatives did not influence them. (See *Price v. Georgia*, 398 U.S. 323 [1970].)

Stated still another way, how can it be concluded from the general verdicts returned in this case that none of the jurors were convinced Simpson was guilty because of one of the other possibilities (*i.e.*, other than concealing) that were submitted to them. Further, how can it be said, even if they found him guilty on the appellate Court's concealing theory, that this verdict was uninfluenced by the inclusion of the constitutionally impermissible alternatives that were likewise submitted to the jury.

All this, in our judgment at least, exposes the Court's view that Simpson was convicted solely on the basis of concealing to not only be arbitrary, but illogical.

Even more specifically, and all that has been said here is with full deference to the Court, in our judgment, the Court of Appeals' rejection of our *ex post facto* argument suffers from the same infirmities as does the Court's ratiocinations with reference to the duplicitous argument. And for the same basic reasons, only more so.

Again, the Court's argument is premised on the proposition that "a conviction for knowledgeable concealment under the statute of March 20, 1972, would not be *ex post facto* because that was a crime under the statute effective before March 20, 1972". As to this specific point, there can be no dispute, and we offer none. But all this is really beside the point, as is the fact that the Court's charge dealt with concealment in terms of the date October 27, 1972.

The problem with the Court's *ad hoc* reasoning pattern is that it totally ignores the fact that the multiple-choice charge permitted the jury to find Simpson guilty on the theory that he "did receive or buy" the Cadillac; or if he did "receive, buy . . . or operate" (R 2710-2711) the Volkswagen. And, they were given the right to use the reduced standard of proof—that is, "reasonable cause to believe".

So structured, the language of *Stromberg v. California*, 283 U.S. 359, 367-368 (1931), uttered in an analogous situation, seems compelling. Here, the Court stated:

> "The verdict against the appellant was a general one. It did not specify the grounds upon which it rested. As there were three purposes set forth in the statute, and the jury were instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. *If any one of these clauses, which the state court has held to be separable, was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause.* It may be added that this is far from being a merely academic proposition as it appears, upon an examination of the original record filed with

> this Court, that the State's attorney upon the trial emphatically urged upon the jury that they could convict the appellant under the first clause alone, without regard to the other clauses. *It follows that instead of its being permissible to hold, with the state court, that the verdict could be sustained if any one of the clauses of the statute were found to be valid, the necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld.*" (Emphasis added.)

If the above quote from *Stromberg*, which reversed a *state court* conviction, is not dispositive of this issue in the Petitioner's favor; then consider the case of *Leary v. United States*, 395 U.S. 31, at 30-32 (1969).

In *Leary*, this Court was dealing with two alternative theories which were submitted to the jury as a basis for Leary's conviction. One of these alternatives permitted the jury to rely on an *unconstitutional* presumption; hence, a conviction on that theory would be invalid. In *Leary*, the Court reasoned with the following cogent language:

> "Under the second or 'North-South' theory, the conviction would have depended partly upon petitioner's testimony that he had transported the marihuana from New York to Texas and *partly upon the challenged presumption.*
>
> The Government contends that by giving testimony at trial which established all elements of the offense under the 'South-North' theory, and by failing to object to the jury instructions on the ground now advanced, petitioner foreclosed himself from raising the point thereafter. We cannot agree. Even assuming that petitioner's testimony did supply all the

evidence required for a valid conviction under the 'South-North' theory, *the jury nevertheless was told that it could alternatively convict with the aid of the* presumption under the 'North-*South' theory. For all we know, the conviction did rest on that ground.* It has long been settled that when a case is submitted to the jury on alternative theories, the unconstitutionality of any of the theories requires that the conviction be set aside." (*ibid.*) (Emphasis added.)

Since a segment of the instructions was not valid, as was the case in *Stromberg*, the conviction here must be viewed as invalid.

The Court's suggestion that the defense failed to object to the Court's instruction on the *ex post facto* theory must, of course, bear the weight of the objections made to the Court to withdraw these alternatives because evidence was insufficient to support a conviction that Simpson violated the statute as particularized in the indictment. Further, there was our specific complaint over the trial court's unwillingness to eliminate the *disjunctive* aspects of the charges.

But even apart from that, surely one *cannot* even consent to be convicted on an unconstitutional charge.

VII. It Is a Violation of Due Process to Instruct the Jury That One Can Be Convicted of Committing One Offense Upon Proof He Committed Another Distinctly Different Offense.

In this case, the Court, over defense objections, instructed the jury the petitioner could be convicted if they were satisfied he "intentionally hid or put out of sight, or disassembled, or disguised or did any other act to keep the vehicle out of sight to avoid its being observed"

(R 2714). Since there was no evidence, absolutely none, that this car was ever "hid or put out of sight, or disassembled" in the sense of the statute prohibiting concealment, the only effect of this charge is that it authorized the jury to convict if they were satisfied petitioner "disguised" this vehicle.

Stated another way, the Court's indication in its definition of "conceal" equated this with disguise. The defense objected to this innovation (R 2733). Thus, this instruction cannot survive the simple recognition that had the Legislature intended the crime of concealing a motor vehicle to be synonymous with that of buying, selling, disposing of, concealing, or having in one's possession a motor vehicle with a concealed identity (*R. C. of Ohio*, §4549.07), there would have been no need for this latter statute, and it would have been repealed along with the predecessor to *R. C. of Ohio*, §4549.04.

Thus, we contend (the position of the Court of Appeals to the contrary notwithstanding) that the trial Court's instruction, to which reference has been made (R 2733), constituted a prejudicial misdirection within the meaning of *R. C. of Ohio*, §2945.83. Given this premise, it necessarily follows that the contention made here must be reckoned within favor of reversal. This is so for the very simple reason that it surely must be a violation of due process to instruct a jury (as was done here) that one can be convicted of one crime on the basis of proof that he committed a different crime.

CONCLUSION

The conviction of Charles Simpson, on the basis of the record in this case, although startling, must truly be regarded as a tragedy. For, surely it must be that our

concepts of due process still recognize the fact that a fair and full cross examination to develop facts in issue or relevant to the issue is a matter of absolute right and is not a mere privilege to be exercised in the sound discretion of the presiding judge. If this is so, then this Court will recognize that Simpson's right of confrontation (—that is, his right to effectively cross examine, and his entitlement to all relevant evidence) was sufficient to overcome any legitimate state interest in preserving the confidentiality of a possibly phantom informer.

Given further the undeniable fact that privileges of this nature are limited by those principles of fundamental fairness, there simply does not surface here any realistic basis for ratifying, or otherwise validating, the actions either of the prosecutor or the courts below.

The same is true of the trial court's unwillingness to allow counsel to study the statements and the video tape of the witness' interview with the police. As to this, simply to allow counsel to hear the Court read the statement aloud (once) and to hear and see the video tape (once) does not comport with the requirements of due process.

For these and all of the other reasons in this case, corrective action is required of this Court. Final judgment for the petitioner is, of course, our ultimate request. If not this, then surely a new trial is at least required.

Respectfully submitted,

JAMES R. WILLIS, ESQ.
1212 Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114
216/523-1100
Attorney for Petitioner

APPENDIX A

Order of the Supreme Court of Ohio Denying Motion for Leave to Appeal

(Dated October 16, 1975)

No. 75-816

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

1975 Term
To wit: October 16, 1975

STATE OF OHIO,
Appellee,
vs.
CHARLES SIMPSON,
Appellant.

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS FOR CUYAHOGA COUNTY

It is ordered by the Court that this motion is overruled.

APPENDIX B

Order of the Supreme Court of Ohio Dismissing Appeal

(Dated October 16, 1975)

No. 75-816

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

1975 Term
To wit: October 16, 1975

STATE OF OHIO,
Appellee,
vs.
CHARLES SIMPSON,
Appellant.

APPEAL FROM THE COURT OF APPEALS FOR CUYAHOGA COUNTY

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

APPENDIX C

Opinion and Journal Entry of the Court of Appeals of Cuyahoga County, Ohio

(Dated June 12, 1975)

No. 33506

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,
Plaintiff-Appellee
vs.
CHARLES SIMPSON
Defendant-Appellant

Appeal From Common Pleas Court
No. 6859 & 6860 Cr.

JOURNAL ENTRY

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

On October 10, 1972, the Cleveland Police Department Automobile Investigation Unit received information from

an undisclosed informant that the defendant Charles Simpson and others were operating an auto theft ring (Tr. 12-14). The ring's operation involved the purchase of wrecked automobiles from salvage yards (cf. Tr. 15-17, 343-347, 508-524). The certificates of title from these cars were then used as proof of ownership of stolen cars with the vehicle identification numbers of the stolen cars being altered to match the wrecked cars. If the description of the wrecked and stolen cars did not match, the stolen car was altered to seem to conform to model and model year (Tr. 1919-1934, 1966-1979).

Based on the "tip", the police made an independent investigation with the Ohio Title Bureau and National Auto Theft Bureau in Chicago. This investigation disclosed that Charles Simpson had title in his name to a 1971 Cadillac and his wife had title to a VolksWagen (cf. Tr. 14-31, 15, 16). The physical description of the VW matched the description of a VW recently reported stolen in Cleveland (Tr. 32-33, 37-39). Although there was no report of a stolen 1971 Cadillac, the Cadillac driven by Charles Simpson did not match the description it should have had if the title certificate was correct (cf. Tr. 21 with 24; Tr. 134-135).

Officer McComb, who was in charge of the investigation, reported his findings to the County Prosecutor. Together they presented them to a judge of the Common Pleas Court on October 27, 1972, in the form of an affidavit requesting a search warrant be issued for the VW. After additional sworn testimony, not recorded and not in the record, was presented to the judge, a search warrant for the VW issued.

The VW was seized and impounded. Earlier investigation of the reported stolen VW revealed that its owner, cautious of auto theft, placed slips of paper with his name and address in each of the door panels of the auto (Tr. 38).

After the seized VW was removed to a police lot, the interior panels of each door were removed. Found inside were slips of paper bearing the name and address of the owner of the reported stolen VW (Tr. 44-45).

Officer McComb and the Prosecutor then returned to the judge who had issued the initial search warrant for the VW. Information concerning the search of the VW was reported to the judge who issued a second warrant for the Cadillac (Tr. 50). The Cadillac was seized at Defendant Simpson's home in Cleveland Heights (Tr. 51) on October 27, 1972.

On December 12, 1972, the grand jury returned two indictments against Charles Simpson. The first count of the first indictment charged violation of Ohio Revised Code 4505.19(D), selling an auto with altered identification numbers (a Camero sold by Charles Simpson on May 1, 1972). The second count charged violation of Ohio Revised Code 4549.04(E), concealing a stolen motor vehicle (the Cadillac). In the second indictment Charles Simpson was co-indicted with his wife for a second violation of Ohio Revised Code 4549.04(E) (the VW).

Both indictments against Charles Simpson were consolidated but a motion for severance was granted as to the second, joint, indictment with Mrs. Simpson as co-defendant. A motion to suppress, challenging the search warrants, was made and heard prior to trial. The motion was denied. On trial the jury found Charles Simpson guilty as to all counts.

Defendant assigns twenty-eight errors. However, he has formulated ten arguments which encompass his complaints. Accordingly, we treat those ten as defendant's assignments of error:

"I. An affidavit for a search warrant which makes no effort to show the source of an undisclosed informant's conclusions, or to demonstrate that he is credible or his information otherwise reliable cannot support the issuance of a search warrant for the seizure of a motor vehicle as stolen property.

"II. An intentional or recklessly untruthful misrepresentation will result in an invalidation of a warrant, as will an unintentional misrepresentation, or a willfully deceptive representation of a material issue of fact.

"III. The right of confrontation and the hearsay rule are both violated when a crucial witness is allowed to relate as substantive evidence the contents of conversations had with an undisclosed informant, and with others—including a Judge and the County Prosecutor.

"IV. Disclosure of the identity of an alleged informant is required where it appears necessary (1) to avoid the risk of false testimony, (2) to secure useful testimony, or (3) it is essential to a fair determination of a cause of issue.

"V. Given the right to impeach a witness by showing prior inconsistent statements, counsel must be given sufficient latitude to lay a proper foundation.

"VI. Where the probative value of any proffered evidence is severely outweighed by its prejudicial aspects, due process requires that it be excluded.

"VII. Where an indictment charges that a motor vehicle owned by a specifically designated person, or entity, was unlawfully received, purchased, or concealed, proof that the certificate of title listed another and different person as owner, on the crucial date alleged, affords a sufficient basis for voiding such conviction.

"VIII. Due process is violated where the court resorts to disjunctive language in charging a jury.

"IX. A law which alters the rules of evidence so as to permit an accused to be convicted upon less or different evidence than was required when the charged crime supposedly was committed is invalid as *ex post facto*.

"X. Given statutory prohibitions against 'concealing' a stolen vehicle and against buying, selling, disposing of, concealing or having in one's possession a motor vehicle with a concealed identity, it is a violation of due process to instruct the jury that one can be convicted of committing one offense upon proof he committed another distinctly different offense."

For reasons assessed below we find none of the assignments well taken.

Argument No. I:

"An affidavit for a search warrant which makes no effort to show the source of an undisclosed informant's conclusions, or to demonstrate that he is credible or his information otherwise reliable cannot support the issuance of a search warrant for the seizure of a motor vehicle as stolen property."

Defendant argues that the search warrant issued for the VolksWagen fails the two-prong test of *Aguilar v. Texas* (1964), 378 U.S. 108, 12 L. Ed. 2d 723 and *Spinelli v. United States* (1969), 393 U.S. 410, 21 L. Ed. 2d 637. Those cases deal with probable cause established from information supplied by an undisclosed informant. In the initial search warrant issued in the instant case, probable cause was established from information supplied by the affiant from his *own* knowledge irrespective of any additional allegation in the search warrant attributed to an undisclosed informant. The police had to start somewhere. There is no constitutional infirmity in police simply *investigating* tips or even acting on suspicion.

> "Corroboration through other sources of information reduced the chances of a reckless or prevaricating tale. . . ." *United States v. Harris* (1971), 403 U.S. 573 at 581, 29 L. Ed. 2d 723 at 732 quoting *Jones v. United States* (1960), 362 U.S. 257, 4 L. Ed. 2d 697.

On the basis of the tip in the present case police checked records and determined that an automobile did not match the description reasonably to be expected if the car was in fact legally obtained. Further, the alleged date of purchase of the automobile was near the date of a reported stolen vehicle which matched the description of the car. All this information was in the personal knowledge of the affiant and not based on hearsay.

The search warrant for the Cadillac poses a different question which does not activate *Aguilar* and *Spinelli* principles. The underlying facts and circumstances presented to the magistrate was again information within the personal knowledge of the affiant and not based on hearsay. One of the underlying facts was this: The title to the Cadillac being driven by defendant belonged to an

automobile that was originally bronze in color, the actual color of the car driven by defendant is black. The—

> ". . . consensus of their [police officers] opinion [sic] [was] that that automobile painted black appears to be an original paint job."

This statement was made by a police officer experienced in auto theft investigation. It should, therefore, properly be given weight. This statement is coupled with an allegation by an undisclosed informant that the automobile was stolen and that the same defendant possesses another stolen automobile. The "other" automobile was the VolksWagen seized early on the same day pursuant to a valid search warrant and upon seizure proven to be in fact stolen. This was a corroborating circumstance.

Because the information contained in the affidavits themselves establish probable cause for the issuance of the search warrants, it is unnecessary to consider defendant's claimed error that the unrecorded testimony given to the issuing magistrate was inadmissible at the hearing on the motion to suppress.

Argument No. I is without merit.

Argument No. II:

> "An intentional or recklessly untruthful misrepresentation will result in an invalidation of a warrant, as will an unintentional misrepresentation, or a willfully deceptive representation of a material issue of fact."

Defendant argues that the warrants are invalid because information supplied by the informant did not subsequently "check out" when investigated. No case has been cited that holds either (1) *all* information given to police officers by undisclosed informants must be stated in the affidavit, or (2) if any information stated by the

informant turns out to be inaccurate, the search warrant is invalid notwithstanding the fact that the accurate information standing alone is sufficient to establish probable cause, see *United States v. Damitz* (9th Cir., 1974), 495 F. 2d 50 at 53-55.

Argument No. II is without merit.

Arguments Nos. III and IV:

"The right of confrontation and the hearsay rule are both violated when a crucial witness is allowed to relate as substantive evidence the contents of conversations had with an undisclosed informant, and with others—including a Judge and the County Prosecutor."

"Disclosure of the identity of an alleged informant is required where it appears necessary (1) to avoid the risk of false testimony, (2) to secure useful testimony, or (3) it is essential to a fair determination of a cause of issue."

These arguments raise substantially same issues and are treated together.

Defendant argues that the identity of the informant should have been disclosed. The test which determines whether the identity of an informant must be disclosed is whether the identity of the informant is essential to a fair trial for the defendant, *Roviaro v. United States* (1956), 353 U.S. 53, 62, 1 L. Ed. 2d 639, 646. Defendant was charged with two counts of concealing or receiving and one count of altering a motor vehicle. Nowhere is it alleged that the informant was a participant in these acts to the extent necessary to prove defendant's guilt. All participating parties in the transactions were identified by the State, e.g., Moyers and J. W. Auto Parts. It is not

shown that the informant could have supplied information helpful to the defense on the merits, *Roviaro, supra*, 353 U.S. at 63-64 and 1 L. Ed. 2d at 647.

The only purpose the informant could have served at trial would have been to impeach Officer McComb's testimony respecting the original lead in the case (Tr. 1916, 2045, 2047). But even if this aspect of McComb's testimony could have been totally impeached, there is enough evidence to have convicted Simpson without the information supplied to McComb by the informant. The error, if any, is harmless.

Arguments Nos. III and IV are without merit.

Argument No. V:

"Given the right to impeach a witness by showing prior inconsistent statements, counsel must be given sufficient latitude to lay a proper foundation."

Defendant contends that the trial court erred in not allowing proper cross-examination of the State's witness, Tyrone Battle. This contention is based on the claimed refusal to allow defense counsel to show a prior inconsistent statement. Battle denied making the statement (Tr. 1183-1187; cf. 1190-1194), and it was not established that it was, in fact, made by him (cf. 1190). Under these circumstances, it was not improper to refuse to allow the use of the statement to impeach him.

Argument No. V is overruled.

Argument No. VI:

"Where the probative value of any proffered evidence is severely outweighed by its prejudicial aspects, due process requires that it be excluded."

. . . Defendant argues that it was improper and prejudicial to introduce evidence of the purchase of a 1969 Corvette titled in the name of defendant's wife. The frailties in the chain of title to the Corvette were similar to those claimed to be characteristic of the three vehicles charged in the indictments. In order for the State to prove defendant's guilt with respect to the three vehicles it was permissible for the State to show the scheme or plan by which defendant obtained the vehicles. Therefore, the arrangement by which the Corvette was obtained was relevant to the charges against defendant under Ohio Revised Code 2945.59. That the title to the vehicle was in the defendant's wife, a co-defendant, is immaterial in the light of the fact that it was defendant who purchased the car (Tr. 1049-1050) and he himself sold the car (Tr. 2083).

Argument VI is without merit.

Argument No. VII:

"Where an indictment charges that a motor vehicle owned by a specifically designated person, or entity, was unlawfully received, purchased, or concealed, proof that the certificate of title listed another and different person as owner, on the crucial date alleged, affords a sufficient basis for voiding such conviction."

The gist of the charge with respect to the car in question (the Cadillac) was that defendant knew that it was stolen or had reason to believe it was stolen. The proof was that the Cadillac was stolen from Mark A. Hartley. This established one necessary element of the crime. The remaining elements of defendant's knowledge or reason to know did not rest on the ownership of the car on October 27, 1972. It is not necessary under the statute that defendant know the owner of the car. It is necessary only that he have knowledge that it was stolen.

Argument No. VII is without merit.

Argument No. VIII:

"Due process is violated where the court resorts to disjunctive language in charging a jury."

Under Argument VIII defendant argues that the indictment relating to the VolksWagen and Cadillac charges are void for duplicity. Duplicity is the combining of two or more crimes in a single count, *Parker v. Maxwell* (1963), 174 Ohio St. 471. The charge under Ohio Revised Code 4549.04(E) is but one crime although it may be committed in a number of ways:

> "'A statute often makes punishable the doing of one thing *or* another, *or* another, sometimes thus specifying a considerable number of things. Then, by proper and ordinary construction, a person who in one transaction does all, violates the statute but once, and incurs only one penalty. Yet he violates it equally by doing one of the things. * * *'" *State v. Hopkins* (1971), 26 Ohio St. 2d 119 at 121-122.

There was sufficient evidence for reasonable minds to conclude, as the jury did, that defendant was guilty of concealing the automobiles on October 27, 1972, knowing they were stolen.

Argument VIII is without merit.

Argument No. IX:

"A law which alters the rules of evidence so as to permit an accused to be convicted upon less or different evidence than was required when the charged crime supposedly was committed is invalid as *ex post facto*."

Defendant argues that he cannot be charged with a crime requiring a lesser degree of proof than necessary under the law as it existed when the crime was alleged to

have occurred. This argument is directed in the first instance to the first count of that one of the indictments returned December 12, 1972, which charged that the defendant on or about October 27, 1972:

> "unlawfully did receive, buy or conceal a Cadillac automobile, the personal property of Farmers Insurance Group, which had been stolen from Mark A. Hatley,* the said Charles A. Simpson well knew said personal property to have been stolen or having reasonable cause to believe said automobile to have been so obtained as aforesaid."

The alleged misconduct was claimed to offend Ohio Revised Code 4549.04(E) which became effective March 20, 1972.

If defendant is to prevail on this point, it must appear (1) that the crime of which he was convicted was not a crime when committed and did not become a crime before March 20, 1972, or (2) that the statute of that date changed the weight or kind of proof requisite to conviction for a criminal act completed before that date. Either condition would render the statute unconstitutional as applied to the defendant.

The record clearly supports the inference that defendant received the Cadillac in late November or early December, 1971 (Tr. 742-751). He still had possession in October 27, 1972 (Tr. 44-51). From this a reasonable inference of concealment with knowledge of the theft is proper. Thus, a conviction for knowledgeable concealment under the statute of March 20, 1972, would not be *ex post facto* because that was a crime under a statute effective before March 20, 1972. Moreover, the concealment continued after March 20, 1972. The question then is whether the lessening of the requisite knowledge to convict effects an *ex post facto* operation when applied to the present defendant. A juxtaposition of the March 20 statute and its predecessor, with the additions effective March 20, 1972, underlined, will demonstrate the nature of the change in knowledge necessary to convict:

*Spelled Hartley at other places in the record.

STEALING AND TAMPERING

4549.04 (12619). Stealing motor vehicles.

No person shall commit any of the following acts:

(A) Steal any motor vehicle;

(B) Purposely take, drive, or operate any motor vehicle without the consent of its owner;

(C) Buy or conceal any motor vehicle that has been stolen, knowing it to have been stolen;

(D) Knowingly conceal a person who has stolen any motor vehicle.

(Repealed March 20, 1972)

§ 4549.04. Stealing motor vehicles.

(A) No person shall steal any motor vehicle.

(B) No person shall purposely take, operate, or keep any motor vehicle without the consent of its owner, and either remove it from this state, or keep possession of it for more than forty-eight hours.

(C) No person shall, with intent to defraud, hire a motor vehicle or operate or keep a motor vehicle which has been hired. It is prima-facie evidence of an intent to defraud if the offender does any of the following:

(1) Hires the motor vehicle by means of any false representation or by means of the unlawful use of a credit card;

(2) Hires the motor vehicle knowing he is without sufficient means to pay the hire;

(3) Absconds without paying the hire for the motor vehicle;

(4) Knowingly fails to pay the hire for the motor vehicle on its return, in the absence of a prior agreement for extended credit, without reasonable excuse for such failure;

(5) Knowingly fails to return the motor vehicle as required by the contract of hire, without reasonable excuse for such failure.

(D) No person shall purposely take, operate, or keep any motor vehicle without the consent of its owner.

(E) No person shall *receive*, buy, *operate*, conceal, or *dispose* of a motor vehicle that was obtained by means of an auto theft offense, knowing or *having reasonable cause to believe it to have been so obtained.*

The charge to the jury's consideration was carefully confined to *concealment*, and *only* concealment, on or about October 27, 1972, with knowledge that the automobile in question was stolen or "having reasonable cause to believe said automobile to have been so obtained" (Tr. 2712). In this posture the charge confined the applicable law to a crime which continued after the enactment on March 20, 1972. The diminished knowledge requirement also was not effective until after that date. Under these

circumstances the doctrine of *ex post facto* does not apply.*

For whatever effect, if any, a failure to object under Rule 30, Crim. Rules, may have in curing a basic constitutional error, were there one, it is noted that defendant did not object to the charge on the point here at issue.

Argument No. IX is without merit.

Argument No. X:

"Given statutory prohibitions against 'concealing' a stolen vehicle and against buying, selling, disposing of, concealing or having in one's possession a motor vehicle with a concealed identity, it is a violation of due process to instruct the jury that one can be convicted of committing one offense upon proof he committed another distinctly different offense."

Defendant argues that the meaning of the word "disguised" is not within the meaning of Ohio Revised Code 4549.04(E). He argues that any crime of "disguising" is properly charged under Ohio Revised Code 4549.07. Ohio Revised Code 4549.07 relates only to identifying characteristics other than the physical appearance of the car. Defendant was not charged under the latter section. However, disguising is a reasonable synonym to use in an instruction to the jury to explain the crime of concealing a motor vehicle under Ohio Revised Code 4549.04(E). In any event the instructions, if erroneous at all, could not have affected substantial rights of the defendant. In the context of the charge the meaning in relation to the crime

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*Defendant raises the same issue with respect to charges relevant to the Volkswagen. Disposition is the same.

of concealment was obvious, not misleading and did not effect a charge on a different offense (see Tr. 2714).

Argument No. X is without merit.

It is ordered that appellee(s) recover of appellant(s) its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rule of Appellate Procedure. Exceptions.

KRENZLER, *C.J.*, DAY, *J.*, CORRIGAN, *J.*, concur

/s/ AL I. KRENZLER
Presiding Judge

APPENDIX D

Journal Entry of the Court of Appeals of Cuyahoga County, Ohio Denying Rehearing

(Dated July 3, 1975)

Court of Appeals No. 33506

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT, CUYAHOGA COUNTY

STATE OF OHIO
Appellee

vs.

CHARLES SIMPSON
Appellant

JOURNAL ENTRY

Motion by defendant-appellant for rehearing overruled. Exc.

KRENZLER, *C.J.*, DAY, *J.*, CORRIGAN, *J.*, concur

/s/ AL I. KRENZLER
Presiding Judge

APPENDIX E

Journal Entry of the Court of Common Pleas

(Dated September 24, 1973)

STATE OF OHIO,)
) ss
CUYAHOGA COUNTY)

September Term, 1973

To-wit: September 24, 1973

No. CR-6859 & CR-6860
(Consolidated for Trial)

INDICTMENT C.S.M.V. w/ct C.S.M.V. w/ct
Altered Auto Identification

STATE OF OHIO
Plaintiff

vs.

CHARLES SIMPSON
Defendant

JOURNAL ENTRY

This day again comes the Prosecuting Attorney on behalf of the State and defendant, Charles Simpson was brought into Court, represented by counsel and the Jury duly impaneled and sworn.

Now comes the Jury, conducted into Court by the Bailiff and returned the following verdicts in writing, to-wit: "We, the Jury in this case being duly impaneled and sworn do find the defendant, Charles Simpson, guilty of Concealing Stolen Motor Vehicle, RC. 4549.04(E), in: re:

Volkswagen, as charged in the first count of the indictment." and "We, the Jury in this case being duly impaneled and sworn, do find the defendant, Charles Simpson, guilty of Concealing Stolen Motor Vehicle, RC. 4549.04(E), in: re; Cadillac, as charged in the second count of the indictment." and "We, the Jury in this case being duly impaneled and sworn, do find the defendant, Charles Simpson, guilty of Alter Auto identification, RC. 4505.19(D), in; re; Camaro, as charged in the third count of the indictment."

Thereupon, the Court informed the defendant of the verdict of the Jury, and inquired of him if he had anything to say why judgment should not be pronounced against him and he having nothing but what he had already said and showing no good and sufficient cause why judgment should not be pronounced.

It is, therefore, ordered and adjudged by the Court that defendant, Charles Simpson, be imprisoned and confined in the Ohio Penitentiary, Columbus, Ohio, under counts one (1) and (2), RC. 4549.04(E), for an indeterminate period, according to law, and he pay the costs of this prosecution for which execution is awarded.

Sentence as to count one (1) and two (2) to run concurrent.

It is further ordered by the Court that defendant, Charles Simpson, be sentence to the Cleveland House of Correction for a period of six (6) months, and he pay a fine of one thousand ($1,000.00) dollars.

And now the Court suspends the six (6) month sentence to the Cleveland House of Correction, and the fine is also suspended.

Original bond continued.

JAMES F. KILCOYNE, *Judge*

APPENDIX F

IN THE COURT OF COMMON PLEAS
CRIMINAL BRANCH

STATE OF OHIO)
) ss.
COUNTY OF CUYAHOGA)

SEARCH WARRANT

To: CHIEF OF POLICE OF THE CLEVELAND OHIO POLICE DEPARTMENT and/or DETECTIVE WILLIAM MCCOMB, a member of said Department.

WHEREAS there has been filed with me an affidavit consisting of two pages, a copy of which is attached hereto, designated as Exhibit A and A-1 and incorporated herein as though fully rewritten herein, wherein the affiant avers that he believes and has good cause to believe that the 1970 two door sedan Volkswagen, yellow in color with black interior, bearing license number A B 1114, titled in the name of Nancy L. Simpson and driven by one Charles A. Simpson, is in fact the automobile of one Allen Clapp stolen on August 10, 1971.

I am satisfied that there is probable cause to believe that the grounds for issuance of this search warrant exist.

You are hereby commanded in the name of the State of Ohio, with the necessary and proper assistance, to serve this warrant and search forthwith for the automobile specified, making search in the day season, and if said automobile or any part thereof be found, you are commanded to seize it, leaving a copy of this warrant and a receipt for the property taken, prepare a written inventory of the property seized and return this warrant, and bring

the property found on such search forthwith before me, or some other judge or magistrate of the county having cognizance thereof, to be disposed of and dealt with according to law.

Given under my hand, this 27th day of October, 1972.

/s/ DAVID T. MATIA
Judge, Court of Common Pleas Cuyahoga County, Ohio

IN THE COURT OF COMMON PLEAS
CRIMINAL BRANCH

STATE OF OHIO)
) ss.
COUNTY OF CUYAHOGA)

AFFIDAVIT FOR SEARCH WARRANT

Before me, a Judge of the Court of Common Pleas of Cuyahoga County, Ohio, personally appeared William McComb, who being first duly sworn deposes and says that he is a member of the Cleveland Police Department and as such he received information from an informant to the effect that a Volkswagen automobile, 1970, was stolen in Cleveland, Ohio in the early part of August, 1971; that in the month of September, 1971, a Charles A. Simpson purchased a wrecked 1970 Volkswagen from Moyer's Used Cars and that he, Simpson, is using the title certificate relating to the wrecked Volkswagen for the aforesaid stolen Volkswagen.

The affiant says that this informant proved reliable by a subsequent check of the records of the Clerk's Office, which records reveal that one Nancy L. Simpson, the wife of Charles A. Simpson, is listed as the owner of a two

door sedan 1970 Volkswagen, purchased September 14, 1971 from Moyer's Used Cars.

A further investigation reveals that Moyer's purchased this automobile the day previously, September 13, 1971, and the car had previously been owned by Shirley K. Patton. A further investigation reveals that this automobile was a white two door sedan with red interior. A further investigation reveals that a 1970 two door sedan driven by Charles A. Simpson, the husband of Nancy L. Simpson, the certificate of title which is traceable back to Shirley K. Patton does not relate to a white two door sedan with red interior but rather to a yellow two door sedan with a black interior.

Further investigation reveals that on August 10, 1971 a yellow two door sedan with a black interior Volkswagen was stolen from one Allen Clapp in Cleveland, Ohio. Further investigation reveals from a check of the National Auto Theft Bureau that this was the only Volkswagen stolen in Ohio during the months of August and September of 1971 that has not been recovered.

Further investigation reveals that the owner of the Volkswagen which had been sold to Moyer's Used Cars by Shirley K. Patton was a total wreck to such a degree that it was virtually impossible to repair the same.

All of the aforesaid investigative information and records dovetail with what the informant has advised and therefore makes him reliable.

Predicated on the foregoing, the affiant has reason to believe that the 1970 two door sedan Volkswagen, yellow in color, bearing license number A B 1114 and titled in the name of Nancy L. Simpson and driven by Charles A. Simpson, is in fact the automobile of Allen Clapp stolen August 10, 1971.

The affiant respectfully requests that a search warrant be issued in the day season to search for and seize for the purposes of further identification the 1970 two door sedan, yellow in color with black interior, bearing license number A B 1114 wherever the same may be found within the jurisdiction of this Court.

/s/ WILLIAM McCOMB

SWORN to before me and subscribed in my presence this 27th day of October, 1972.

/s/ DAVID T. MATIA
Judge, Court of Common Pleas Cuyahoga County, Ohio

APPENDIX G

IN THE COURT OF COMMON PLEAS
CRIMINAL BRANCH

STATE OF OHIO)
) ss.
COUNTY OF CUYAHOGA)

SEARCH WARRANT

To: CHIEF OF POLICE OF THE CLEVELAND OHIO POLICE DEPARTMENT and/or DETECTIVE WILLIAM McCOMB, a member of said Department

Whereas there has been filed with me an affidavit consisting of two pages, a copy of which is attached hereto, designated as Exhibit A and A-1 and incorporated herein as though fully rewritten, wherein the affiant avers that he believes and has good cause to believe that the 1971

Eldorado convertible Cadillac, black in color, titled in the name of Charles A. Simpson and driven by Charles A. Simpson is a stolen automobile. Said 1971 Eldorado convertible Cadillac titled and driven by Charles A. Simpson is bearing license number A B 1115.

I am satisfied that there is probable cause to believe that the grounds for issuance of this search warrant exist.

You are hereby commanded in the name of the State of Ohio, with the necessary and proper assistance, to serve this warrant and search forthwith for the automobile specified, making search in the day season, and if the automobile or any part thereof be found, you are commanded to seize it, leaving a copy of this warrant and a receipt for the property taken, prepare a written inventory of the property seized and return this warrant, and bring the property found on such search forthwith before me, or some other judge or magistrate of the county having cognizance thereof, to be disposed of and dealt with according to law.

Given under my hand this 27th day of October, 1972.

/s/ DAVID T. MATIA
Judge, Court of Common Pleas Cuyahoga County, Ohio

IN THE COURT OF COMMON PLEAS
CRIMINAL BRANCH

STATE OF OHIO)
) SS.
COUNTY OF CUYAHOGA)

AFFIDAVIT FOR SEARCH WARRANT

Before me a Judge of the Court of Common Pleas of Cuyahoga County, Ohio personally appeared William McComb, who being first duly sworn deposes and says that he is a member of the Cleveland Police Department and as such he received information from an informant to the effect that a 1971 Eldorado convertible, black Cadillac, being driven by and titled in the name of Charles A. Simpson is a stolen automobile. The affiant says that predicated on this information, he determined from records of the Bureau of Motor Vehicles, State of Ohio, that there is a 1971 Eldorado Convertible titled in the name of Charles A. Simpson, which records reveal that Simpson allegedly acquired this automobile on February 10, 1972 from the Pearson Motor Sales, Columbus Ohio and that the Pearson Motor Sales Company had acquired the same automobile on February 2, 1972 from the J. W. Auto Parts, West Jefferson, Ohio, which company in turn had on February 1, 1972 acquired the same from Bob Patterman, Inc., Fort Mitchell Kentucky.

The affiant further says that the records of the National Automobile Theft Bureau reveals that the automobile relating to the aforesaid title certificate was originally a metallic bronze color. The affiant says in the course of his investigation, he has, along with other members of the Cleveland Police Department, observed the 1971 Eldorado Convertible Cadillac, driven by Charles A. Simpson and it is the consensus of their opinion that that

automobile painted black appears to be an original paint job.

The affiant says further that the informant has proven to be reliable for he has previously given information relative to Charles A. Simpson possessing a stolen Volkswagen automobile and that information has proven to be true.

Predicated on the foregoing, the affiant has reason to believe that the 1971 Eldorado convertible Cadillac, black in color, bearing license number A B 1115 is a stolen motor vehicle.

The affiant respectfully requests that a search warrant be issued in the day season to search for and seize for the purpose of further identification, the 1971 Eldorado convertible, black in color, bearing license number A B 1115 wherever the same may be found within the jurisdiction of this Court.

/s/ WILLIAM MCCOMB

SWORN to before me and subscribed in my presence this 27th day of October, 1972.

/s/ DAVID T. MATIA

Judge, Court of Common Pleas Cuyahoga County, Ohio